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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 410

OWEN N. PRICE, TRUSTEE FOR BONDHOLDERS OF THE WESTERN TOOL & MANUFACTURING CO., ET AL., PETITIONERS,

vs.

JAMES G. GURNEY, INDIVIDUALLY AND ON BEHALF OF OTHER SHAREHOLDERS OF THE WESTERN TOOL & MANUFACTURING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1944.

CERTIORARI GRANTED OCTOBER 23, 1944.

INDEX

	PAGE
Caption	1
Petition for reorganization, filed January 11, 1943	1
Affidavit of James G. Gurney	4
Exhibit A—Voting trust agreement	10
Injunctional order, entered January 12, 1943	11
Motion of Bondholders' Protective Committee to dismiss petition, filed February 5, 1943	13
Application of Western Tool & Manufacturing Co., filed February 5, 1943	15

STATEMENT OF TESTIMONY.

PETITIONER'S WITNESSES.

	Direct	Cross	Re-direct	Re-cross
Owen N. Price (adverse witness)	17	21	22	
Erna Wheeler (adverse witness)	23			
William T. Kettering (adverse witness)	24			
James Gurney	29	32	33	

RESPONDENT'S WITNESSES.

	Direct	Cross	Re-direct	Re-cross
R. C. Chapman	33	35		
W. W. Keifer	38	39	41	42

PAGE

Petitioner's Exhibits (continued).

Exhibit		Identified	Offered	Printed
20	Statement of profit and loss for year ended December 31, 1942 of Western Tool & Mfg. Co	25	26	86
21	Inventory and appraisement of assets and property of Western Tool & Mfg. Co	25	26	89
22	Excerpts from Constitution and By-Laws of The Western Tool & Mfg. Co.	26	26	43
23	Amendments to Constitution and By-Laws of The Western Tool & Mfg. Co.	26	26	44
23	Minutes of Stockholders meeting, held March 28, 1941	26	26	44
	Minutes of Directors meeting, held March 28, 1941	26	26	45
	Minutes of Stockholders meeting, held March 27, 1942	26	26	46
	Minutes of Directors meeting, held March 27, 1942	26	26	47
24-30	Letters from John M. Cole to Charles W. Stiefel, Jr.	40	42	Omitted

Respondent's Exhibits.

From Petitioner's Exhibit		Identified	Offered	Printed
23	Minutes of Directors meeting, held September 6, 1941	32	42	48
23	Minutes of Stockholders meeting, held January 26, 1935	42	42	49
23	Minutes of Stockholders meeting, held February 1, 1936	42	42	50

PAGE

Order dismissing petition and proceedings, entered July 17, 1943 89

Decision, filed July 17, 1943 90

Order dissolving injunction, entered August 11, 1943 96

Notice of appeal, filed August 11, 1943 97

Order extending time to file record on appeal, entered August 11, 1943 98

Bond for costs, filed August 11, 1943 99

Appellants' designation of record, filed September 3, 1943 102

Statement of points, filed September 3, 1943 105

Appellees' Designation of record, filed September 14, 1943 106

Clerk's certificate 107

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

Page

Motion of the Western Tool & Manufacturing Co. to Dismiss 109

Motion of Owen N. Price, trustee for Bond Holders, to Dismiss 110

Cause Argued and Submitted 111

Judgment 112

Opinion 112

Petition for Rehearing 125

Order on Petition for Rehearing 135

Certificate of Clerk 135

Order allowing certiorari 136

CAPTION.

UNITED STATES OF AMERICA,

IN THE DISTRICT COURT OF THE UNITED STATES,
IN AND FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PETITION.

(Filed January 11, 1943.)

To the Honorable Judges of the District Court of the United States, for the Southern District of Ohio, Western Division:

Your petitioner, The Western Tool & Manufacturing Co., respectfully represents:

1. Petitioner is a corporation organized and existing under the laws of the State of Ohio and is a corporation which could become a bankrupt under the Acts of Congress relating to bankruptcy and is not a municipal, insurance or banking corporation or a building and loan association or a railroad corporation.

2. Your petitioner now has and for the last six months preceding the filing of this petition has had its principal office and place of business at Springfield, Ohio within the territorial jurisdiction of this Court.

3. The nature of the business of the petitioner is the ownership and operation of a factory for the manufacture of tools, which factory is located in Springfield, Ohio.

4. Petitioner was incorporated in the year 1904 under the name of the Western Manufacturing Company, which name was subsequently changed to The Western Tool & Manufacturing Co.

5. The assets of petitioner consist of land, buildings, machinery, equipment, inventory consisting of raw materials, goods in process and finished goods, cash on hand and notes and accounts receivable.

6. The current liabilities of petitioner consist of current accounts payable, including wages and salaries and current and accrued taxes. The current liabilities have been incurred from day to day in the operation of said plant, both prior to July 15, 1942 and subsequent to said date. Subsequent to July 15, 1942 the property and factory of your petitioner has been operated by William T. Kettering as receiver, appointed in the Court of Common Pleas of Clark County, Ohio, as more fully hereinafter set forth.

7. Petitioner is unable to pay its debts as they mature.

8. The property of petitioner is subject to a first Mortgage Deed of Trust securing bonds in the unpaid principal amount of Seventy-three Thousand Four Hundred ($73,400.00) Dollars which by their terms bear interest at eight per cent per annum; that the original principal amount of bonds secured by said first Mortgage Deed of Trust was Ninety Thousand ($90,000.00) Dollars and that interest on Ninety Thousand ($90,000.00) Dollars of said bonds was paid at the rate of eight (8) per cent per annum up to the first day of May 1923; upon Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars of said bonds at the rate of six and one-half (6½) per cent per annum from May 1, 1923 to May 1, 1924 and upon Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars of bonds at the rate of six (6) per cent per annum from May 1, 1924 to November 1, 1929; that thereafter your petitioner purchased Sixteen Thousand Six Hundred ($16,600.00) Dollars face value of said bonds and thereby the same were cancelled and that thereafter, on June 16, 1942, your petitioner paid to certain individuals acting as a Bondholders' Protective Committee and being the holders of bonds in the principal amount of Seventy-three Thousand Four Hundred ($73,400.00) Dollars, the sum of Sixteen Thousand ($16,000.00) Dollars to be applied upon the indebtedness evidenced by the bonds held by such Bondholders' Protective Committee; that the interest paid upon said bonds at the rate hereinbefore set forth, the same being less than the rate of interest in and by said bonds provided, was made pursuant to agreement between your petitioner and said Bondholders' Protective Committee and thereafter said Committee agreed to accept interest upon said bonds at the rate of four (4) per cent per annum.

The Mortgage Deed of Trust securing said bonds was dated November 1, 1921 and conveyed all the property of your petitioner, real and personal, except cash, notes and accounts receivable and inventories.

9. On July 9, 1942, Owen N. Price, as Trustee under said Mortgage Deed of Trust, filed in the Court of Common Pleas of Clark County, Ohio, his certain petition to foreclose the lien of said Mortgage Deed of Trust, which cause was designated as No. 36421; thereafter, on July 15, 1942, one William T. Kettering, a resident of the State of Illinois, was, in said cause, appointed receiver of all the property, assets and rights of your petitioner and the said William T. Kettering accepted such appointment and has since said date been in possession of all the assets of your petitioner and has been operating the factory and plant of your petitioner.

10. On December 8, 1942 there was entered in said cause a judgment and order of foreclosure, in which there was found to be due from your petitioner upon the aforesaid bonds the sum of One Hundred Thirty-four Thousand Six Hundred Ninety-eight and 21/100 ($134,698.21) Dollars, which indebtedness so found to be due included interest at the rate of eight (8) per cent per annum despite the agreement made between your petitioner and said Bondholders' Protective Committee that said principal indebtedness should bear interest at the rate of four (4) per cent per annum; that a motion has been made to vacate said judgment and order of foreclosure, which motion is now pending and undisposed of.

11. Petitioner has an authorized capital of Two Hundred Thousand ($200,000.00) Dollars, divided into two classes, viz: Fifty Thousand ($50,000.00) Dollars preferred stock and One Hundred Fifty Thousand ($150,000.00) Dollars common stock, each class consisting of shares of a par value of One Hundred ($100.00) Dollars per share; that there are issued and outstanding one thousand one hundred twenty and one-half (1120½) shares of common stock and no preferred stock.

12. The specific facts showing the need for relief under Chapter X of said Act are as follows:

The value of the assets of your petitioner is greatly in excess of the indebtedness, both principal and interest, due

to the holders of the indebtedness secured by the Mortgage Deed of Trust sought to be foreclosed as aforesaid, which excess value will be lost to petitioner's stockholders in the pending foreclosure action; your petitioner is presently engaged in the manufacture of war products; that although your petitioner was operating at a profit prior to such foreclosure action, your petitioner is in need of additional machinery and equipment and of more modern machinery and equipment to replace obsolete and obsolescent equipment to enable your petitioner to operate at greatly increased profits, the financing of which additional machinery and equipment your petitioner can obtain if the mortgage indebtedness is adjusted, and the Bondholders' Protective Committee will not consent to any adjustment or extension of the indebtedness evidenced by said first mortgage bonds.

13. Adequate relief cannot be obtained under the provisions of Chapter XI of the Acts of Congress relating to Bankruptcy for the reasons, among others, that the principal indebtedness of petitioner is secured as aforesaid.

14. Petitioner desires that a plan of reorganization be effected for it under and pursuant to Chapter X of said Act.

15. No other petition by or against petitioner is pending under Chapter X of this Act, nor is any other bankruptcy proceeding by or against petitioner now pending.

WHEREFORE petitioner prays:

A. That an order be entered approving this petition.

B. That further proceedings may be had upon this petition in accordance with the provisions of Chapter X of said Act and your petitioner may have such other and further relief as is necessary.

THE WESTERN TOOL & MANUFACTURING CO.
By JAMES G. GURNEY.

State of Illinois } ss
County of Cook }

James G. Gurney, being first duly sworn, on oath deposes and says that he is the owner of seven (7) shares of the One Hundred ($100.00) Dollar par value common stock of The Western Tool & Manufacturing Co., and

that he is the agent and attorney-in-fact and holds the proxy of Harlan T. Hyde, James Gurney (also known as James Gurney, Jr.) and Stella K. Gurney and as such agent and attorney-in-fact has full power and authority to do all things which the aforesaid principals might or could do in the protection and advancement of their interest as shareholders of said corporation.

Affiant further says that Stella K. Gurney is the owner and holder of sixty-six like shares of said corporation; that James Gurney (also known as James Gurney, Jr.,) is the owner and holder of fifty-nine (59) like shares of said corporation and that Harlan T. Hyde is the owner and holder of five hundred fifty and three-fourths (550¾) like shares of said corporation; that the duly issued and outstanding shares of said corporation are one thousand one hundred twenty and one-half (1120½) common shares.

Affiant further says that under date of November 1, 1923, one Charles S. Deneen, now deceased, W. T. Kettering, the present receiver of said corporation, W. D. Hollister, Enoch J. Price and Edward I. Bloom entered into an agreement with the holders of the outstanding first mortgage eight (8) per cent serial gold bonds described in the foregoing petition, wherein and whereby the aforenamed persons undertook to act and did thereafter act as a Committee for said bondholders and did thereafter, pursuant to the terms of said agreement, become vested with the legal title to all of said bonds and coupons; that bonds of the principal face amount of Eighty-nine Thousand Seven Hundred ($89,700.00) Dollars was thereafter deposited by said bondholders; that Edward I. Bloom is no longer a member of said Committee but for more than three (3) years last past W. T. Kettering, W. D. Hollister, and Enoch J. Price have exercised all the powers and rights conferred by said agreement upon said Committee.

Affiant further says that under date of July 20, 1923 the aforesaid Charles S. Deneen, now deceased, W. T. Kettering, W. D. Hollister and Enoch J. Price, as members of such Committee, entered into a Voting Trust Agreement with James Gurney (also known as James Gurney, Jr.) and certain other parties, copy of which is attached hereto and designated as Exhibit A; that the said James Gurney (also known as James Gurney, Jr.) deposited with such said Voting Trustees the certificate or certificates repre-

senting the fifty-nine (59) shares of stock of said corporation by him owned and a Certificate of Beneficial Ownership was issued to him therefor; that on April 30, 1928 Harlan T. Hyde acquired a Certificate of Beneficial Ownership issued by the said Voting Trustees representing the deposit with them of four hundred forty-three and one-half (443½) shares of the capital stock of said corporation by Edward S. Thomas and a new certificate of Beneficial Ownership was issued to him therefor.

Affiant further says that since November 1, 1923, the said persons acting both as a Bondholders' Committee and as Voting Trustees, having on deposit with them six hundred forty (640) shares of the issued and outstanding shares of the capital stock of said corporation, have managed and controlled the affairs of said corporation; that prior to March 28, 1941 the Board of Directors of said corporation consisted of seven persons, viz: William J. Grimm, Erna H. Wheeler, one Rust, W. T. Kettering, Enoch J. Price, Harlan T. Hyde and affiant; that the By-laws of said corporation provided that Directors may be elected either at an annual meeting of stockholders to be held on the fourth Tuesday of January in each year or at a special meeting of stockholders called for that purpose, at which special meeting the holders of three-fifths (3/5) of the outstanding shares of the corporation shall be present in person or by proxy.

Affiant further says that on the 17th day of March 1941 a notice was sent at the direction of Enoch J. Price to Harlan T. Hyde of the holding of a purported annual meeting of stockholders, to be held on the 28th day of March 1941, and further stating: "Inasmuch as nothing of importance will be brought up at the meeting it will not be necessary for you to attend"; that at said time Harlan T. Hyde was residing in the state of Florida and in reliance upon said representations did not attend; that at said meeting held on March 28, 1941, there was represented in person and by proxy only six hundred forty-eight and one-half (648½) shares of the outstanding capital stock of said corporation, the same being less than three-fifths (3/5) thereof; that no notice whatsoever of the holding of said meeting was given to Stella K. Gurney; that at said meeting the number of Directors was reduced from seven (7) to five (5) and Harlan T. Hyde and the said

Rust were not elected to be Directors of said corporation; that such election of Directors was wholly void and invalid and immediately thereafter a purported Directors' meeting was held at which Enoch J. Price was elected President, W. T. Kettering was elected Vice President and Erna H. Wheeler was elected Secretary, Treasurer and Manager; that the said Erna H. Wheeler and William J. Grimm are salaried employees of the corporation and at all times subject to the direction and control and subservient to the wishes of Enoch J. Price and W. T. Kettering; that another purported annual meeting of stockholders of said corporation was held on the 27th day of March 1942, of which meeting no notice was given to Stella K. Gurney or Harlan T. Hyde and at which meeting there was represented in person and by proxy only six hundred fifty-eight and one-half (658½) shares of the capital stock of said corporation, being less than three-fifths (3/5) thereof; that at said purported meeting the same persons, the purported Directors, were purportedly re-elected Directors and the same persons were immediately thereafter purportedly re-elected as officers.

Affiant further says that the said corporation is without a *de jure* Board of Directors or *de jure* officers for the reasons aforesaid and that Enoch J. Price and W. T. Kettering, who are exercising the functions of those offices individually and by and through their tools Erna H. Wheeler and William J. Grimm are, in fact, and have for a number of years last past, occupied conflicting and inconsistent fiduciary positions in that as members of the Bondholders' Protective Committee they have fiduciary duties and obligations to the bondholders, as Voting Trustees they have fiduciary obligations and duties to the depositing stockholders and as Directors and officers they have fiduciary duties and obligations to all the stockholders depositing and non-depositing; that they have controlled the affairs and functions of the corporation since 1923 solely for the interest of the bondholders and to the disinterest of the stockholders in that they have utilized funds of the corporation to purchase and acquire Certificates of Deposit of first mortgage bonds of the face or par value of Sixteen Thousand Six Hundred ($16,600.00) Dollars, they have caused the corporation to pay to them as a Bondholders' Committee the sum of Sixteen Thousand ($16,000.00) Dol-

lars on June 16, 1942 and have not accounted therefor, they have caused funds of the corporation to be paid to themselves by way of salary, fees or otherwise and they have caused funds of the corporation to be paid to them as and for their expenses as the Bondholders' Committee.

Affiant further says that on or prior to July 20, 1923, the said Bondholders' Committee agreed with James Gurney, Jr., and other shareholders of said corporation, to cause a refunding of said bond issue at a rate of interest not exceeding four (4) per cent per annum; that they have failed to cause such refunding and have caused said corporation to pay to the said Bondholders' Committee interest in excess of that rate as set forth in the foregoing petition and in addition thereto have caused a judgment to be entered in the foreclosure proceedings set forth in said petition, which judgment included interest upon the said mortgage bonds at the rate of eight per cent (8%) per annum; that they have at all times refused to purchase or acquire, or permit said corporation to purchase or acquire more modern and efficient machinery or to adopt more efficient methods of production; that none of them is acquainted with modern methods of tool production and although repeatedly requested by affiant have refused to obtain the advice and counsel of a production engineer in order to enable the corporation to increase its production and lower its costs of operation; that such refusals were based upon the desire of said Bondholders' Committee to obtain all possible funds of the corporation for the benefit of the bondholders and not to permit any of the profits of said corporation to be reinvested for improvement in method or equipment.

Affiant further says that on June 15, 1942 Harlan T. Hyde and James Gurney (also known as James Gurney Jr.) demanded of the aforesaid Voting Trustees the return of the Certificates of stock theretofore deposited with them, which demand was refused; that the Voting Trust Agreement under which such certificates are retained by said Voting Trustees has by its terms terminated inasmuch as the bond issue therein mentioned was not refunded by said Committee and said Voting Trust Agreement is illegal and void under and by virtue of the laws of the state of Ohio and is of no force and effect as the same has expired.

Affiant further says that James Gurney (also known as James Gurney, Jr.), Stella K. Gurney, Harlan T. Hyde and this affiant did heretofore demand that said corporation file the foregoing petition, which demand was not complied with despite the fact that in said foreclosure proceedings said corporation wrongfully admitted all the allegations in the petition for foreclosure contained and permitted a judgment in said foreclosure proceedings to be entered without objection in an excessive amount and ordering the sale of properties and assets of the corporation upon which the lien of said Mortgage Deed of Trust had expired.

Affiant further says that the only way in which the excess value of the stockholders' interests in the assets of said corporation, over and above the indebtedness of said corporation, can be preserved is in and by this proceeding.

Affiant further says that neither he nor any of his principals have been given a balance sheet or statement of profit and loss of said corporation but that the same is within the sole knowledge of the persons purporting to act as Directors and officers thereof, being the persons who refused to comply with the demand to institute this proceeding, and that therefore affiant cannot attach hereto a balance sheet, statements of assets and liabilities nor an operating statement of said corporation.

Further affiant sayeth not.

JAMES G. GURNEY.

Subscribed and sworn to before me this 9th day of January, A. D. 1943.

Hattie Niemann,
Notary Public.

(Seal)

My commission expires 3/10/44.

EXHIBIT A

Voting Trust Agreement

The Western Tool and Manufacturing Co.

This agreement entered into as of the 20th day of July, 1923, between Henry Morris, James Gurney, Jr., and Edw. Thomas of the first part, and Charles S. Deneen, W. T. Kettering, W. D. Hollister, and Enoch J. Price, of the second part, witnesseth:

That, whereas said parties of the first part are owners of certain shares of the capital stock of the Western Tool and Manufacturing Co., and said parties of the second part are members of a bondholders' committee appointed by the holders of the bonds of an issue of $100,000 made by said company under date of November 1, 1921, which committee was appointed to protect the interests of said bondholders; and

Whereas said committee is willing to proceed to cause said bond issue to be refunded at a lower rate of interest with more favorable terms of payment than the present, provided it is enabled to control the policy of said company pending the payment of such refunded bond issue;

Therefore, in order to enable said bondholders' committee to so control the policies of said corporation pending the payment of said bonds, said first parties have delivered to said committee certificates of stock of said—The Western Tool and Manufacturing Co., as follows:

Henry Morris—shares	87.50
Edward S. Thomas—shares	443.50
James Gurney, Jr.—shares	59.
	590.00 Total

Said second parties shall cause said shares to be transferred into their joint names as Trustees on the books of the corporation, and they shall continue to hold all said shares pending the payments in full of the refunding bond issue to be arranged for by said committee with full exclusive right to vote the same at all stockholder's meetings of said corporation, while so held, as such Trustees or a majority of them shall determine. Said Trustees or

any one of them may act by a duly appointed proxy in the voting of said shares.

In case any dividend shall be declared on said shares during the life of this agreement, the same shall be paid to the depositors of the said shares, respectively, or to their assigns or legal representatives; said trustees shall not have any interest in or right to any dividend declared on said stock while it is held by them.

The interest of the depositors of said shares of stock respectively, may be sold or assigned, and if requested by any depositor, said second parties shall issue to him a certificate of the shares belonging to such depositor which certificate shall be assignable to the same extent and in the same manner as the stock certificates so deposited.

When the purpose of this voting trust is fully accomplished by the payment or extinguishment of said bond issue, or in the event that said bond holder's committee shall fail to secure the refunding of said bond issue, said parties of the second part shall cause said shares to be returned to the depositors or their assigns or legal representatives and transferred on the books of said corporation.

In case one or more of said second parties should resign, die or refuse to act, the remaining members shall have full power in all respects to act for all in voting said stock and redelivering it to the proper parties.

Witness our hands and seals this day and year above witness.

ORDER.

(Filed January 12, 1943.)

This matter came on to be heard upon the Petition of The Western Tool & Manufacturing Co., filed by James G. Gurney, Harlan T. Hyde, James Gurney, also known as James Gurney, Jr., and Stella Gurney, praying this Court to take jurisdiction of this cause under Chapter X of the Bankruptcy Act, and to approve the Petition as filed in good faith; the Court, being fully advised in the premises,

finds that the within Petition was properly filed under Chapter X of the Bankruptcy Act and the said Petition is hereby approved as having been filed in good faith.

It is therefore ordered and decreed that Owen N. Price, as Trustee for the bondholders, William T. Kettering, as Receiver, Erna H. Wheeler, all creditors, lienholders, pledgees and escrowees of The Western Tool & Manufacturing Co., their agents, alteregoes, attorneys, nominees, trustees and/or assigns, and all other persons, including sheriffs, marshals, and other officers and their deputies, are hereby enjoined and restrained, without notice, from seizing or attempting to seize, the assets or from disturbing the present possession of William T. Kettering, as Receiver, of said assets and property of The Western Tool & Manufacturing Co., or instituting, or further prosecuting any actions or suits at law or in equity in any court of the United States, or any state thereof, against said The Western Tool & Manufacturing Co., or its assets, or before any commission or other administrative bodies or boards, or from hypothecating or attempting to hypothecate, or sequester, any of the property or assets of said The Western Tool & Manufacturing Co., or in which said The Western Tool & Manufacturing Co., may have any right, title, or interest, or from selling or attempting to sell any of the assets or property, except the manufactured product, of The Western Tool & Manufacturing Co., in their possession as Receiver, escrowees or otherwise, or from removing the same, or permitting the same to be removed from the place where same is now situated, and all other persons including creditors, lienholders, pledgees, escrowees, their agents, alteregoes, attorneys, nominees, trustees and/or assigns, and all other persons, including sheriffs, marshals and other officers and their deputies hereby are enjoined and restrained from in any way interfering with the orderly business of The Western Tool & Manufacturing Co., or in the orderly administration of said estate by William T. Kettering, as Receiver, and from in any way committing or attempting to commit any action whatsoever which may result in temporary disruption or interference with the orderly operation of said property and business.

It is further ordered that the Clerk of this Court send a copy of this order to The Securities Exchange Commis-

sion, that the said Owen N. Price, as Trustee, William T. Kettering, as Receiver and Erna H. Wheeler, personally appear within ten days after the service of the writ, to answer to the Petition filed by The Western Tool & Manufacturing Co., by James G. Gurney, Harlan T. Hyde, James Gurney, also known as James Gurney, Jr., and Stella Gurney.

This cause is continued for further hearing until Friday, February 19th, 1943, at 10:30 A. M.

Approved:

NEVIN,
Judge.

CHARLES W. STIEFEL.
GEO. R. MURRAY

MOTION OF THE BONDHOLDERS' PROTECTIVE COMMITTEE.

(Filed February 5, 1943.)

Now come Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering and say they are a duly constituted Committee under a Bondholders' Protective Agreement of November 1, 1923, under which holders of bonds issued by The Western Tool & Manufacturing Co., dated November 1, 1921, secured by Mortgage Deed of Trust of November 1, 1921, executed by said Company and recorded in Volume 133, page 17, et seq., of Mortgage Records of Clark County, Ohio, deposited their said bonds in accordance with said Agreement and thereby assigned and transferred said bonds and the coupons attached thereto to said Committee so that this Committee thereupon became the owner and holder of such bonds with full power and right to enforce and collect the same.

That $73,100.00 of said bonds are now so held by this Committee (and have been so held for more than fifteen years,) comprising all of the outstanding bonds issued by said Company and secured by said Mortgage Deed of Trust, except $300.00 of said bonds owned by persons un-

known to the Committee, to said Company and to the Trustee under said Mortgage Deed of Trust, which have neither been so deposited and transferred nor presented for payment of interest or otherwise heard of for more than twenty years; and upon a plea by said Company, in the hereinafter mentioned proceedings have been declared barred by the statute of limitations.

That pursuant to the provisions of said Bondholders' Protective Agreement the depositary of said Committee has duly issued and delivered to each of said depositing bondholders, a certificate to the effect that such bondholder has deposited his or her bonds in accordance with the terms of said Agreement, a true copy of which is filed herewith.

That on request and by direction of said Committee the present indenture Trustee under said mortgage Deed of Trust has reduced to judgment the debt due said bondholders in the case of *Owen N. Price, Trustee* v. *The Western Tool and Manufacturing Company*, No. 36421, in the Court of Common Pleas of Clark County, Ohio, which judgment was rendered December 8, 1942 in the sum of $134,698.21, to bear interest from that date at eight per cent per annum, upon which judgment there was paid $7,310.00 on December 23, 1942 by the Receiver appointed therein, in accordance with the order of said Common Pleas Court.

This Bondholders' Protective Committee now moves the Court to dismiss the Petition herein for the following reasons, to wit:

First: The Petition herein was filed without the authority of said The Western Tool & Manufacturing Co. or its Board of Directors and without the knowledge, assent or authority of any of its officers or any of its directors other than James G. Gurney.

Second: It is unreasonable to expect that a plan of reorganization of said corporation can be effected; in fact it is plainly impossible to effect a reorganization since there are no unsecured creditors and, apart from taxes to the State of Ohio and to the United States, there is but one class of creditors, all of the valid and outstanding bonds secured thereby, $73,100.00 in amount, being held by one secured creditor, to-wit: This Bondholders' Protective Committee.

Third: The petition herein was not filed in good faith, but was filed by said James G. Gurney, the owner of only three shares of stock, without authority or legal right in pursuance of his attempt to dictate the policy and management of said corporation for his own personal advantage and to delay or defeat the corporation's effort to pay its bonded indebtedness.

This Motion is to be supported by affidavits or by oral testimony, if so directed by the Court.

W. D. Hollister,
Wm. T. Kettering,
Roy Massena,
Enoch J. Price, *Secretary*,
Bondholders' Protective Committee.

Keifer & Keifer,
Keifer & Keifer
(Springfield, Ohio)
Attorneys.

APPLICATION OF THE WESTERN TOOL & MANUFACTURING CO.

(Filed February 5, 1943.)

The Western Tool & Manufacturing Co., by its President and Secretary, represents to the Court that said Company has not authorized the filing of the Petition in this proceeding and that the same was filed without the authority, acquiescence or knowledge of any of the officers of the Company or any of the directors other than James G. Gurney.

This corporation has no general creditors and had none at the time of the appointment of the Receiver by the Court of Common Pleas of Clark County, Ohio, and the only creditors are the bondholders secured by Mortgage Deed of Trust upon all the property of the Company and income taxes due to the United States and taxes due the State of Ohio, which are also preferred claims. The debt

due to said bondholders has been reduced to judgment in the case of *Owen N. Price, Trustee,* v. *The Western Tool & Manufacturing Company,* No. 36421, in the Court of Common Pleas of Clark County, Ohio, which judgment was rendered December 8, 1942, in the sum of $134,698.21, to bear interest from that date at 8 per cent per annum, upon which judgment there was paid $7,310.00 on December 23, 1942. The current wages accruing to employes at the time of the appointment of said Receiver, (not then due), were fully paid by said Receiver under the order of said Court of Common Pleas.

This Company does not consent to the jurisdiction of the Court over it in this proceeding nor does it join in, consent or desire that this proceeding be maintained or that any reorganization thereof be had.

Wherefore, this Company asks for the proper order and direction of the Court.

THE WESTERN TOOL & MANUFACTURING CO.,
By ENOCH J. PRICE,
President.

ERNA H. WHEELER,
Secretary.

W. H. GRIFFITH
Attorney
Springfield, Ohio.

State of Illinois, } ss.
County of Cook, }

Enoch J. Price, being first duly sworn, says that he is the President and a director of The Western Tool & Manufacturing Co. of Springfield, Ohio, a corporation, and that the statements in the foregoing Application of said Company are true, as he verily believes.

ENOCH J. PRICE.

Sworn to and subscribed before me this 28th day of January, 1943.

RUTH C. NETTLAND,
Notary Public.

(Seal)

State of Ohio,)
County of Clark,) ss.

Erna H. Wheeler, being first duly sworn, says that she is the Secretary, Treasurer, General Manager and a director of The Western Tool & Manufacturing Co. of Springfield, Ohio, a corporation, and that the statements in the foregoing Application of said Company are true, as she verily believes.

ERNA H. WHEELER.

Sworn to and subscribed before me this 30th day of January, 1943.

EVA M. HAUCK,
Notary Public.

Eva M. Hauck
Notary Public, Clark County, Ohio
(Seal) My Commission Expires Jan. 14, 1944

NARRATIVE STATEMENT OF TESTIMONY OF WITNESSES HEARD FEBRUARY 19, 1943 BEFORE THE HONORABLE ROBERT R. NEVIN, DISTRICT JUDGE, AT DAYTON, OHIO.

(Filed September 3, 1943)

OWEN N. PRICE, called by Petitioner as a witness under Rule 43(b) of Federal Rules of Civil Procedure, as an adverse party, having been first duly sworn, testified as follows:

Direct Examination.

"My name is Owen N. Price. I live at 2124 West 112th Street, Chicago, Illinois. I am an attorney-at-law at the Bar of the City of Chicago, State of Illinois.

I am a son of Enoch J. Price, President of The Western Tool & Manufacturing Company. I am also the Trus-

tee under the first mortgage trust instrument. I instituted the foreclosure proceeding in the Court of Common Pleas of Clark County, Ohio against The Western Tool & Manufacturing Company in my capacity as Trustee."

Stipulation of counsel that Petitioner's exhibit 1 is a true and correct copy of the Petition filed by Owen N. Price, as Trustee under the first mortgage deed of trust of The Western Tool & Manufacturing Company on July 9, 1942, seeking a foreclosure of such mortgage deed of trust; that Petitioner's exhibit 2 is a true and correct copy of the answer of The Western Tool & Manufacturing Company in such foreclosure proceedings which answer states "Defendant admits the truth of all the allegations of the Petition and consents to the appointment of a Receiver;" that Petitioner's exhibit 3 is a true and correct copy of an amendment to the answer of The Western Tool & Manufacturing Company setting up that with respect to bonds in the total sum of $300.00 the Statute of Limitations has run against the same; that Petitioner's exhibit 4 is a true and correct copy of the Entry of Judgment and Order of Foreclosure in the foreclosure proceedings in the case of Owen N. Price as Trustee *vs.* The Western Tool & Manufacturing Company in the Court of Common Pleas of Clark County, Ohio, designated as No. 36421 rendered December 8, 1942.

The Court: "They may be admitted in evidence according to the exhibit number given them and made a part of this record."

The Witness: "The motion of Owen N. Price as trustee for bondholders filed in the proceeding on February 5, 1943 bears my signature."

The Court: "A copy thereof may be admitted in evidence as Petitioner's exhibit 5."

The Witness: "I am familiar with the signature of my father. Petitioner's exhibit 6, for identification, being a letter bearing date of May 22, 1941 bears my father's signature and Petitioner's exhibit 8, for identification, being a letter in longhand dated August 28, 1941 is in my father's handwriting and bears his signature; Petitioner's exhibit 9, for identification, being a Certificate of Beneficial Ownership of common stock of The Western Tool & Manufacturing Company dated October 18, 1923 bears my

father's signature: Petitioner's exhibit 10, for identification, being a Certificate of Beneficial Ownership of the common stock of The Western Tool & Manufacturing Company bears my father's signature in three places.

The judgment rendered by the Judgment Order, Petitioner's exhibit 4, was in the sum of One Hundred Thirty Four Thousand Six Hundred Ninety Eight Dollars and twenty one cents ($134,698.21).

I know how that sum was arrived at. The factors which were considered were the unpaid interest on the bonds at the rate of 8% per annum from November 1, 1929 and principal amount of bonds of Seventy Three Thousand One Hundred Dollars ($73,100.00). Also considered was the application of Sixteen Thousand Dollars ($16,000.00) on the accrued interest as of June 16, 1942. Sixteen Thousand Dollars ($16,000.00) was paid by The Western Tool & Manufacturing Company a few days before the filing of that suit by me. I don't know to whom that Sixteen Thousand Dollars ($16,000.00) was paid; it went into the hands of the Bondholders Committee.

Sixteen Thousand Dollars ($16,000.00) was applied upon the mortgage indebtedness by accruing the interest to the date of payment, applying the Sixteen Thousand Dollars ($16,000.00) in reduction of the interest to that date. I am a little bit uncertain just how I worked that out. The full amount of the Sixteen Thousand Dollars ($16,000.00) was credited against interest which had been computed at 8% per annum. Paragraph 7 of Page 7 of Petitioner's exhibit 1 being the Petition filed by me to foreclose the mortgage states that interest had been paid by the corporation upon Ninety Thousand Dollars ($90,000.00) of bonds up to May 1, 1923 at the rate of 8% per annum; upon Eighty Nine Thousand Seven Hundred Dollars ($89,700.00) of said bonds at the rate of 6½% per annum from May 1, 1923 to May 1, 1924 and upon Eighty Nine Thousand Seven Hundred Dollars ($89,700.00) of said bonds at the rate of 6% per annum from May 1, 1924 to November 1, 1929. It was my information that the Bondholders Committee had accepted interest for those bonds at those rates; nevertheless, I had the foreclosure judgment compute interest at 8% per annum from November 1, 1929.

The Receiver, under the order of the Court of Common Pleas, paid me Seven Thousand Three Hundred Ten Dol-

lars ($7,310.00) on December 23, 1942 to apply upon the judgment in the foreclosure proceeding; that judgment does not include any fees to me as trustee nor attorneys fees. The Receiver, by order of court, in the foreclosure proceedings paid me Six Hundred Dollars ($600.00). Both trustee's fees to me and attorneys fees were allowed by order of court in addition to the judgment for One Hundred Thirty Four Thousand Six Hundred Ninety Eight Dollars and twenty one cents ($134,698.21).

The amount of that judgment does not include allowances to counsel, to receiver, or the trustee. It is the principal of bonds plus accrued interest to the date of judgment giving effect to all of the payments made. There was paid to my attorney Three Thousand Dollars ($3,000.00) in the foreclosure proceedings. The foreclosure proceeding has never been completed but a judgment has been entered; the property was not sold under the judgment; the Six Hundred Dollars ($600.00) to me and Three Thousand Dollars ($3,000.00) to my attorney were paid by the Receiver from the funds in the estate of The Western Tool & Manufacturing Company. The Receiver was Mr. William T. Kettering, who was also a member of the Bondholders Committee and a director of the corporation and a stockholder of the corporation. I cannot answer the question as to whether the Bondholders Committeee had agreed with the corporation to reduce the interest to 4% per annum.

I am not a member of the Bondholders Committee. I was a trustee prior to the foreclosure action. Petitioner's exhibit 7, for identification, appears to bear my father's signature. I discussed with my father the preparation of petition for foreclosure. I did not prepare the petition. He did not apprise me of any agreement with respect to the rate of interest being reduced to 4%. I knew that the Bondholders Committee had accepted 6% on various occasions in payment of interest for particular interest periods."

The Court: "Petitioner's exhibits 6, 7, 8, 9, and 10 may be admitted subject to any corrections of errors or any objections."

The Witness: "I understand that Mr. Gurney, on behalf of the stockholders of the corporation, retained Mr. Cole of Cole & Hodge of Springfield, as his attorney in

the foreclosure action. I do not know whether that counsel appeared in the case within a few days after the institution of the foreclosure."

Mr. Stiefel: "Is it admitted, Mr. Keifer, that Mr. Cole appeared in the proceedings as early as July 22, within two weeks after the proceeding was filed?"

Mr. Keifer: "I suppose that is true. Yes, I think that is true; I don't remember the date."

The Witness: "The last meeting I had with you, Mr. Stiefel, with respect to The Western Tool & Manufacturing Company was July 10, the day after the foreclosure proceeding was filed and at that meeting I informed you that a foreclosure proceeding had been filed the preceding day."

Cross Examination by Mr. Keifer.

"In my interview with Mr. Stiefel on July 10, the day following the day of the filing of the foreclosure petition, I advised him I had been informed by you (Mr. Keifer) that the Petition had been filed on July 9 and handed him a copy of the Petition, which he read. He asked me what the $16,000.00 item was that was recited as paid on account of the mortgage debt and wanted to know when it had been paid; he expressed the opinion that the stockholders would intervene in the case and would require the return of that money. Mr. Gurney was also present at that interview and heard this conversation. I became Trustee in the year 1935. Before that time The First National Bank of Springfield and Earl K. Stitt were Trustees. Mr. Stitt died in the year 1940 and the Bank had resigned as Trustee in connection with some bank merger.

In computing the amount of the judgment in the foreclosure case there was an error in calculation. As I recall, one or two years interest at 8% on part of the bonds were omitted. The due date of some of the bonds was in 1930 and some in 1931. The interest which had been paid was up to the year 1929, so there were certain coupons paid. In calculating the interest in those two years there was a mistake; I haven't the details of it. It amounted to something around $900.00. If computed according to the allegations of the Petition $900.00 would have been added to the amount of the judgment.

Re-direct Examination.

With the exception of this error, interest was computed from November of 1929 to the date of the Entry of the Judgment. I am simply confessing that there was an arithmetical error. If I had the figures of the due dates of the bonds before me I would be able to show where it is.

Certain bonds were due in November, 1929; there were attached to those bonds interest coupons. There were coupon No. 17 which was attached to bonds which fell due on May 1, 1930 and there were $11,500.00 of bonds maturing November 1, 1930 and $7,000.00 of bonds maturing November 1, 1931. The interest on those coupons amounted to $717.80. There was interest on coupon No. 18 which fell due on November 1, 1930, on the same bonds, amounting to $880.20. There was interest on coupon No. 19 falling due May 1, 1931 on $7,000.00 of bonds maturing November 1, 1931, amounting to $249.20. The interest due on coupon No. 20 on the same bonds amounted to $238.00. The coupons which matured May 1, 1930 amounted to $730.00; the coupons which were due on November 1, 1930 amounted to $740.00; they were on the same bonds. The coupon due May 1, 1931 amounted to $280.00 and those due November, 1931 amounted to $280.00. All those items were included in the judgment. What was not included in the judgment was the interest on $18,500.00 in bonds subsequent to the date the last coupon fell due. The last coupon on $11,500. of the bonds fell due on November 1, 1930; on $7,000.00 of the bonds it fell due November 1, 1931.

Part of that, the interest on $11,500.00 from November 1, 1929 to November 1, 1931 was not included. That interest was not represented by coupons. Those bonds matured in 1929 and 1930. I am mistaken. It was interest for one year on part and two years on the rest. Interest on bonds maturing in 1930 were evidenced by coupons for 1929 and for that part of the year in 1930. I also included in this judgment interest on certain interest coupons between 1929 and 1931. Interest was figured after the maturity of the coupons. I did not include interest in 1929 on coupons which did not mature until 1930 and 1931. I computed interest on the interest coupons at the rate of 8%.

MRS. ERNA WHEELER called by Petitioner as a witness under Rule 43(b) of Federal Rules of Civil Procedure, as General Manager and Agent of The Western Tool & Manufacturing Company, having been first duly sworn testified as follows:

Direct Examination.

My name is Erna Wheeler. I live at 1011 Woodlawn Avenue, Springfield, Ohio. I am in the employ of The Western Tool & Manufacturing Company and have been in its employ for 36 years last January. I am Secretary, Treasurer and Manager. I have been Secretary about 25 years and Treasurer and Manager along with the position of Secretary since July, 1931. I have been the actual operating head of that company since July of 1931. Since July 1931 I was getting $30.00 a week and in 1935 or 1936 I was raised to $35.00 per week, and a year ago I was raised to $40.00 per week. The President of that company, Mr. Price, lived in Chicago and the Vice President, Mr. Kettering, lived near Chicago in Lemont. I have been a Director of that company for 22 years. I was Secretary of the company in 1941 and 1942. Petitioner's exhibits 11, 12, 13 and 14, being letters addressed to Mr. Harlan T. Hyde, all bear my signature and were sent by me to Mr. Hyde. Petitioner's exhibit 15 is a copy of the original demand upon The Western Tool & Manufacturing Company for the filing of a Chapter X proceeding, which was served upon me and which was executed by Mr. Harlan T. Hyde, James Gurney, Stella Gurney and James Gurney by James Gurney, Jr. When I got it I immediately saw our attorney.

I don't know whether the corporation filed a Chapter X proceeding."

The Court: "Petitioner's exhibits 11, 12, 13, 14 and 15 may be admitted subject to any correction or objection Mr. Keifer may have to offer later."

Mr. Keifer: "We don't want any questions of Mrs. Wheeler now. I understand there are limits because of what he has gone into. We will ask her other questions later."

MR. WILLIAM T. KETTERING, called by Petitioner as a witness under Rule 43(b) of Federal Rules of Civil Procedure, as an adverse party, having been first duly sworn testified as follows:

Direct Examination.

"My name is William T. Kettering. I live in Oak Park, Illinois. I was born in the State of Illinois and have been a resident there up to now. I am still a resident of the State of Illinois although I have been spending all of my time in Springfield since the middle of July, since I was appointed Receiver in the foreclosure suit. I was Vice President of The Western Tool & Manufacturing Company and am now Receiver. That corporation is still in existence. I have been a director of that company for possibly 15 years. I am also a member of the Bondholders Committee and have been a member since it was organized in 1923. Petitioner's exhibits 16 and 17, for identification, are the Voting Trust Agreement of the stock.

There are 640 shares of stock deposited with Mr. Charles S. Deneen, Mr. W. D. Hollister, Mr. E. J. Price and myself as Voting Trustees. So far as my recollection goes, 443½ shares were deposited by Edward S. Thomas and 59 shares by James Gurney, Jr.

Mr. Deneen is dead; Mr. Hollister is still active. He lives in Denver, Colorado and has lived there for 4 or 5 years. He has not been a Director of the company for 4 or 5 years. Mr. Price and I, as the Voting Trustees, have voted this stock at the Stockholders' meetings for the Directors of the company. 640 shares constitutes a majority of the outstanding capital stock of the company."

The Court: Petitioner's exhibits 16 and 17 offered and admitted in evidence and made a part hereof.

The Witness: "The members of the Bondholders' Committee are Mr. Hollister, Mr. Massena, Mr. E. J. Price, Mr. Bloom and myself. Mr. Deneen has passed on. It is pretty hard to answer whether Mr. Bloom is still a member of the committee; he has not been at any of our meetings for a number of years. I haven't seen him for 6 or 7 years.

I can't answer when he last attended a meeting. Mr. Hollister is the same Mr. Hollister who is one of the Voting

Trustees. Mr. Enoch J. Price is the same Enoch J. Price who is one of the Voting Trustees. I am a member of the Bondholders' Committee and also a Voting Trustee. Mr. Massena replaced Mr. Deneen a few months ago; prior to that time his place was vacant. I own 20 shares of the stock of The Western Tool & Manufacturing Company in my own right. I bought it from Mrs. Salm while I was a Voting Trustee and on the Bondholders' Committee. I do not own any of the bonds of the company but my family does. I never owned any of the bonds of the company.

Members of my family have been bondholders since the bonds were issued. The principal of bonds on deposit with the Committee is $73,100.00. I presume they were deposited in 1923, that is the start of the Committee. The Committee was formed under the terms of a Protective Agreement dated November 1, 1923, which is marked as Petitioner's exhibit 18 for identification. Those bonds on deposit with the Committee have never been refunded."

Stipulation of Counsel that Petitioner's exhibit 19 for identification, is a Balance Sheet and that Petitioner's exhibit 20, for identification is a Profit and Loss Statement prepared by the Accountant employed at the instance of the Receiver, the Bondholders Committee and Mr. Price, Trustee, to examine the books and prepare such statements of The Western Tool & Manufacturing Company, and that Petitioner's exhibit 21, for identification, is a true and correct copy of an Inventory and Appraisement prepared by the appraisers appointed by the Court in the foreclosure proceeding against The Western Tool & Manufacturing Company.

The Witness: "Petitioner's exhibit 19, being the Balance Sheet of The Western Tool & Manufacturing Company shows a value of $5,000.00 for the land and $29,476.86 for the buildings, or a total of $34,476.86 for the land and buildings. After I became receiver I caused an appraisal of the land and buildings to be made; the total value as fixed by the appraisers was $37,585.00. Petitioner's exhibit 19 discloses the value of the machinery to be $10,527.71. I also had an appraisal made of the machinery in the foreclosure proceedings and the appraised value of the machinery was $15,402.72, but that includes equipment. There might have been a difference. We have fixtures, jigs, pulleys,

belting, separate, you see. About $2,700.00 on Petitioner's exhibit 19 is for dies, jigs, belting and pulleys; that would make a total close to $14,000.00."

Stipulation of Counsel that certain minute books marked as Petitioner's exhibits 22 and 23, for identification, are the minute books of The Western Tool & Manufacturing Company.

Mr. Stiefel: "At this time I want to offer Petitioner's exhibits 18, 19, 20 and 21."

The Court: "They may be admitted subject to correction of errors, if any there are."

Mr. Stiefel: "It has been stipulated by Mr. Keifer that these are correct copies."

Stipulation of Counsel that By-Laws contained in Petitioner's exhibits 22 and 23 are the true and correct By-Laws of the Debtor.

The Witness: "I was present at the annual meeting of Stockholders held March 28, 1941, minutes of which are set forth on page 141 of Petitioner's exhibit 23 for identification. I was present at the annual meeting of Directors held March 28, 1941, the minutes of which meeting appear on page 142 of Petitioner's exhibit 23 for identification. Those minutes correctly set forth what took place at those meetings. I was present at the annual meeting of Stockholders held March 27, 1942, the minutes of which meeting appear on page 146 of Petitioner's exhibit 23 for identification. Those minutes correctly set forth what took place at that meeting. I was present at the annual meeting of Directors held March 27, 1942, the minutes of which meeting appear on page 147 of Petitioner's exhibit 23 for identification, and those minutes correctly set forth what took place at that meeting.

Stipulation of Counsel that Article 1 of the Constitution and By-Laws as it appears on page 5 of the Petitioner's exhibit 22 and the minutes of the meetings appearing on pages 141, 142, 146 and 147 of Petitioner's exhibit 23, for identification, be copied in the record by the Court Reporter.

The Witness: "$16,000.00 was paid by the company to the Bondholders Committee immediately preceding the filing of the foreclosure suit and was credited to the mortgage and the interest. The money was turned over to the Bondholders' Committee, and from there to the Trustee

or the Bondholders' Committee, I have forgotten which, I presume the Bondholders' Committee made payment to the Bondholders; whether all of it was paid at that time I just don't remember; those matters are handled by Mr. E. J. Price.

I can't answer whether the payment was applied to interest or principal. It was interest on interest, I believe, only, the record would show. In addition, there was $7,310.00 paid by me as Receiver on December 23 to apply on interest.

I can't explain why Petitioner's exhibit 20 shows that interest in the amount of $7,640.00 was paid and charged against profits of the company. Interest on Company Bonded Indebtedness was $5,472.00; on Judgment Liability, $666.98; Interest and Discount $1,494.00, making $7,640.00. I can't answer what Interest and Discount represents. I was Receiver from July to December but I can't explain the figures exactly; there is a little difference. Of course, the Accountant could explain. I don't know what date the order of Court was entered in the foreclosure proceedings authorizing me to pay $7,310.00. Mr. Keifer will have to give you that."

Mr. Keifer: "The Order was entered December 22; the payment I believe was December 23".

The Witness: "Petitioner's exhibit 20 is a Profit and Loss Statement of The Western Tool & Manufacturing Company for the year ending December 31, 1942 and shows that only $6,000.00 was paid as interest on the bonded indebtedness. I did pay $7,310.00. It is probably in the $7,640.95, which includes interest on bonded indebtedness and interest on judgment liability.

Those two items don't total $7,310.00; but with interest and discount is $1,494.00. I don't know if interest and discount means discount on sales taken by my customers. Now it comes to me that there was a certain percentage paid on principal, not interest. The two items on Petitioner's exhibit 20 for identification, which set forth the interest paid on Company Bonded Indebtedness and Judgment Liability, total $6,100.00 approximately. The item of $4,400.00 for legal fees appearing on Petitioner's exhibit 20, represents the payments Judge Davis gave us an order to pay out. That was legal fees, Trustee's fees and Receiver's fees. I got part of that and included that as a

charge against the company's profit as well as the legal fees and Trustee's fees in the foreclosure action.

I cannot explain where in the Profit & Loss statement, Petitioner's exhibit 70, the $16,000.00 paid out to the Bondholders' Committee appears. There isn't any $16,000.00 in it. Our auditor could tell that. As shown by Petitioner's exhibit 20, after charging against income for the year 1942 $4,400.00 in foreclosure fees and expenses and Interest payments of $6,100.00, the corporation had a profit before taxes for that year of $78,615.00. At the present time I have on hand as Receiver $20,000.00 worth of Tax Anticipation Warrants and a week ago I had about $51,000 or $52,000 in cash. Our Accounts Receivable were about $12,000.00. I can't tell you the value of the inventory a week ago but it was about the same as December 31, 1942.

Between December 31, 1942 and today my cash has increased approximately $6,000.00 over the amount I then had on hand, as disclosed by Petitioner's exhibit 19, and Receivables have increased about $1,000.00. Our Accounts Payable are not more than $500.00, which is less than they were on December 31, 1942. I have shown a profit between December 31, 1942 and today of approximately $7,000.00.

During my course as Trustee, for a number of years I received no fees from the company. Then I made arrangements with the company to represent them in Chicago on a commission basis. After that I was called down to the plant a great many times, and so they paid me $8.00 a day and my expenses for just coming down. Sometimes I would be there once in two months, or once in a month, two days sometimes, and sometimes 6 or 8 days in a month. I received a 10% commission on all sales made by me. We also got a Director's fee. There never was a $1,000.00 paid to the Bondholders Committee for expenses."

Mr. Keifer: "We agree it was authorized by the Directors but it was not paid."

The Witness: "During the period since 1923 I have been in another business as well. I am not actively in it now. I quit the position since I have been Receiver. I was Vice President of Friedly-Voshardt Company. That company is still in existence. I did not resign; I just went off the payroll completely. I am still Vice President of that company and a stockholder. I cannot approximate

the number of Bondholders there are with The Western Tool & Manufacturing Company. I have not a list of them; our Committee has a list; Mr. Price has it."

Mr. Stiefel: "Have you the list here? I am not interested in the names of the Bondholders at the present time. All I want to know is the number of them."

Mr. Price: "I should say offhand fifty-six."

Mr. Stiefel: "Have you a list of them?" (After conferring with Mr. W. W. Keifer): "Mr. Keifer volunteers, upon information given him by Mr. Price, that there are approximately fifty Bondholders."

Mr. Keifer: "We have no questions at this stage."

MR. JAMES GURNEY called by Petitioner as a witness, having first been duly sworn testified as follows:

Direct Examination.

My name is James Gurney. I am a representative of manufacturers of tools. I have been in that business a little over 20 years. I am a stockholder in The Western Tool & Manufacturing Company, and I am also representing in these proceedings my father, my mother and Mr. Harlan T. Hyde, who are also stockholders. I hold 7 shares of the stock of that company. I am a stockholder of record of 3 shares; the other 4 shares were issued to my sister and transferred to me. My mother is a stockholder of record of 66 shares and Mr. Hyde is a stockholder of record of 104¼ shares that he holds and 443½ that are up on deposit, and my father has on deposit with the voting trustees 59 shares. The total number of shares represented by me in this proceeding is 682 and a fraction, which I think is in excess of 60% of the outstanding shares. I represent Mr. Hyde, my mother and father by proxies and powers of attorney.

Mr. Keifer: "We will agree that he represents them."

The Witness: "I know Mr. Enoch J. Price. He is the father of the gentleman that testified this morning. I had conversations with Mr. Enoch J. Price in May of 1942; I think the first one was in the middle of May. Mr. Price, Mr. Kettering, Mr. Stiefel and I were present in Mr. Price's office in Chicago. I said that there was a demand for tools

now on the part of the various branches of the armed forces and industry and other users that exceeded the supply and I said now is the time or the opportunity for the company to get back on its feet. I also said that there was a substantial amount of the Company's cash on hand, which could be augmented by loans from the Government for the purpose of buying new machinery and equipment to replace the antiquated machinery and equipment and greatly increase production, and at the same time tend to lower the costs of production. I also said that I was a manufacturers' representative and that I could sell the product of the company that would not go directly to the Government, to my other contacts and naturally I expected a commission, which was customarily 10%. I also said that acting on my own initiative I consulted with an outstanding Production Engineer in Chicago who was highly recommended to me by Colonel Slezak, of the Chicago Ordnance District. This engineer said he would come down to the plant and make a study of our plant and products and make recommendations. Mr. Kettering said they would be glad to have him come down at my expense, and I said that I would pay that if they would adopt the engineer's recommendations. I think Mr. Kettering also said that they did not propose to go into debt for any machinery and equipment nor to disburse the company's cash.

Generally speaking, the condition of the Company's machinery and equipment at that time was quite antiquated. I have represented tool manufacturers over 20 years and over the last 5 years my average sales of tools has been in excess of one-half million dollars per year. Some of the contacts that I mentioned to Mr. Kettering and Mr. Price and customers to whom I sell tools are industrials, such as the International Harvester Company, Chicago, Montgomery Ward, Sears, Roebuck & Company, Chicago, the Kimball stores in the Northwest, who operate around 2,500 stores; Western Auto Supply Company on the Pacific Coast, which operate, I believe 500 stores; The Western Auto Supply Company of Kansas City, who operate in excess of 2,000 stores; other syndicates, jobbers and mill supply houses. The first time I requested a change in the policy of the company with respect to improving their machinery and cutting their cost of production and in-

creasing the output was as far back as when I first served on the board of directors, around 1929; I suggested they make changes down there and offer a new product. I had a conversation with Mr. E. J. Price in the latter part of May, 1942. Mr. Price, Mr. Stiefel and I were present. Mr. Stiefel asked Mr. Price if it hadn't been agreed by the Bondholders' Committee that the interest on the bonds be reduced to 4%, and Mr. Price said yes, but they did not have even enough money to pay that much.

I think when I first served as a Director I suggested they get into other lines of tools. I attempted to get orders for them. I contacted Sears, Roebuck & Company two or three years ago with regard to emery wheel dressers, of which they bought quite substantial quantities, and brought a sample down to Springfield and asked the company to prepare something that would approximate it and submit quotations. I think there were some ten or fifteen thousand dressers involved, but it would be a perpetual order, continuous contract arrangement.

No sample was ever prepared nor was a quotation furnished. The rough price would be close to 50c for each dresser."

Stipulation of Counsel that the records of the Voting Trustees disclosed that Harlan T. Hyde is the holder of 443½ shares of the stock of this corporation which has been deposited with the Voting Trustees, and that James Gurney, Junior, the father of the present witness, is the owner of 59 shares, which has been deposited with said Voting Trustees.

Further stipulated that the Stock Register of the corporation affirms that Stella Gurney is the holder of 66 shares of the stock of the corporation and that James Gurney is the holder of 3 shares of stock of the corporation. Further stipulated that Harlan T. Hyde is a stockholder of record of 105 shares and that he holds 2¼ additional shares which on the record stand in the name of O. H. Hyde, which stock certificates have been endorsed to Harlan T. Hyde by O. H. Hyde.

The Witness: "I do not have my stock certificates here. I do not know where they are. I have never sold them or transferred them and I am still the owner and holder of 7 shares of stock of this corporation."

The Court: "What is the par value?"

Mr. Stiefel: "$100.00 par value. It is all common stock."

Cross Examination by Mr. Keifer.

The Witness: "I don't know where my stock certificates are. I attended a meeting of the Board of Directors on September 6, 1941 if the record so states. I don't remember that date. I remember the meeting in Mr. Price's office; there were several meetings. It appears from page 144, exhibit 23 for identification, which purports to be the minutes of the meeting of September 6, 1941 that I made a motion at that meeting. I undoubtedly made it if it is so set forth there.

At the meeting in Mr. Price's office I proposed that I get 10% commission on all sales of the company, excluding sales to the Government. You can neither pay nor receive commission on Government business. It was suggested that Mr. Harlan T. Hyde be employed. He is the largest stockholder, I believe. There was some discussion about it—I don't remember all the details—but the committee found it not desirable. I suggested the employment of Mr. Harlan T. Hyde. I employed Mr. John M. Cole to represent me last July in this matter. I know that the company purchased some bonds from the bondholders at different times at 10, 15 or 20c on the dollar. I knew they were being made and approved of it; it was a matter of record that I voted for it. When I proposed a different policy for the company as to employing engineers and borrowing money the other Directors differed with me. It was their business judgment that that was not the wise thing. At the meeting in Mr. Price's office it was said that that is what wrecked the company in the previous world war. I don't agree with it and I don't think it is the fact. These bonds were not issued to pay off debts for money they had spent for new machinery in the first world war. The occasion of issuing these bonds in 1921 or 1922 was to give the business additional finances and pay off a pressing bank indebtedness and revamp the company so it could put itself back on its regular industrial work. It had been totally on war work. I think it had a big bank indebtedness in 1921.

Re-direct Examination by Mr. Stiefel.

"I don't know whether Mr. Harlan T. Hyde had formerly been employed by the company. In a subsequent conversation with Mr. Price and Mr. Kettering I agreed with them that Mr. Hyde need not be employed."

(Petitioner Rests.)

MR. R. C. CHAPMAN, called as a witness on behalf of respondent, having been first duly sworn, testified as follows:

Direct Examination.

"My name is R. C. Chapman. I live in Flossmoor, Illinois, a suburb of Chicago. I am a federal tax consultant. I have been in private practice since 1920. I was never in Government service. Last week I made an examination of the books of The Western Tool & Manufacturing Company with reference to making a Balance Sheet and a Profit and Loss Statement for the year ended December 31, 1942. Exhibits 19 and 20 appear to be typewritten copies of the pencil copies which I furnished of the Balance Sheet as of December 31, 1942 and the Profit and Loss Statement for the year ended December 31, 1942.

$16,000.00 paid by the company in June 1942 on account of the bonded indebtedness did not appear in these statements. It appears on the books of the company. The $16,000.00 represented a portion of interest accrued up to and including December 1941. The said $16,000.00 was charged against operations prior to December 31, 1941. Obviously, on December 31, 1941, it appeared on the books of account as a liability; therefore, when the $16,000.00 was paid it represented liquidation, in part, in an amount of $16,000.00, of a liability of accrued interest appearing on the books as of December 31, 1941, and therefore does not belong in the operations of the company for 1942. The Balance Sheet as of December 31, 1942, shows on the liability side an account designated as "Liability to Bondholders' Trustee." That is the liability, principal and interest, shown by the judgment decree as of December 8, 1942, as reduced during the period December 8th to De-

cember 31st, 1942, before which time, to-wit, in June, 1942, a $16,000.00 accrued interest liability was paid. Therefore, the $16,000.00 would not appear in either the Balance Sheet as of December 31, 1942, or the statement of Profit and Loss under date of December 31, 1942. The item in the Profit and Loss Statement headed "Legal Fees, including Trustee Fee, $4400.93, represented attorneys fees and a $600.00 payment designated on the books of account as Trustee fees paid during 1942. The Trustee's fees were $600.00; legal fees $3800.93. I have a $1500.00 charge against operations for a Receiver's fee for the year 1942, from the time he was appointed Receiver. $2,880.00 is the total amount. The $1,500.00 was in addition to that which had already been drawn by the Receiver. The books showed legal fees of $800.93 in addition to the amount paid under the order of the Court. There are other attorneys fees paid prior to the receivership; to Mr. Enoch J. Price on June 8, 1942, $62.50; April 1, 1942 $100.00, and to Keifer & Keifer on December 30, 1942, $250.00 and $3,000.00, which was allowed by the court on December 23, 1942. The $250.00 might have been a bill prior to the receivership, but that is when it was paid.

The net profit for the year was $78,615.09. I computed an estimated amount of income, income and excess profits tax for 1942. I find that due to their invested capital condition the credits would be very nominal. They are, therefore, subjected to the highest excess profits tax rate of 80% of the net income, or $62,892.07. I have not prepared their income tax report—that was my estimate within a margin of $1,000.00. In the Profit and Loss Statement (Petitioner's exhibit 20) I have a column at the right "Percentages".

In my experience, a manufacturing company, having manufactured its goods, having the selling, general and administrative expense of less than 9% is extremely low. The percentage here is 8.39. With reference to the manufacturing expense, with labor conditions today, I think it is a question of supply and demand. Other than to say these figures appear to be conservative, I wouldn't care to commit myself as being able to use any definite barometer."

Cross Examination by Mr. Stiefel.

The Witness: "I was employed by Mr. Kettering as Receiver to make this examination. I am a certified public accountant. I am not licensed to practice accountancy in the State of Ohio. I made this examination in the State of Ohio at The Western Tool & Manufacturing Company. Selling and general administrative expense of 8.39 is rather low.

I have had experience with companies who sell practically their entire output to the Government, since December 7, 1941. There is considerable sales expense connected with selling to the Government. No commissions are allowable on sales to Government Agencies. Such selling expense consists of traveling expense and the continuance of advertising, which has been recognized by the Treasury Department. By the publicized route, this company spends very, very little for advertising. It spent $661.00 out of a total of $195,000.00. Their expense for advertising was very small. Advertising is a large recognized expense of a concern who transforms its business during the war period by selling to the Government. The expenditure of substantial sums for advertising would raise the general and administrative expense of other concerns I have had experience with even though they sell to the Government, but this company had only $661.00 of selling expense. I cannot tell you whether practically all of the product of this company, which is located in Springfield, Ohio, goes to Wright Field. I don't know where practically all of their product goes. The traveling expense of this company was only $223.75, so that factor was not present as it was with other companies with which I make this comparison of 8.39 being very low. Total sales commissions during the entire year were only $1,200.00 out of almost $200,000.00 of sales. I did not hear the testimony that the normal sales commission is 10%, which would be $19,000.00. An assumption of a commission of 10% might be right for normal sales but not for war contracts.

I made the 8.39 comparison as being low for selling and general administrative expense. Sales commissions of less than 1% of the gross income from sales is low on sales made on other than on war contracts. My records show that there was $250.00 paid to Keifer & Keifer in Decem-

ber of 1942 by the company. I do not know whether it was as attorney for the company nor whether it was for fees earned prior to the receivership, nor do I know whether Keifer & Keifer represented the plaintiff or the company in the foreclosure proceedings. I could not answer whether it is a proper reduction from income for a company to charge legal expenses paid to someone who was not an employee of the company but is paid under order of court to the other side of litigation as that is a legal question, but I did charge that against the income of this company as an expense.

It depends upon who defrays the expense as to whether Trustee's fees paid to a party who is suing the company and is not an employee of the company is a proper charge against income of the company in computing its profits. The basis upon which I made that charge was that it was charged to "Legal Expense" on the books of account of the corporation, and it was paid by the corporation, and as such I regarded it as an expense chargeable to the expenses of the corporation."

The Court: "You did not go back any further?"

The Witness: "No, sir. I was not hired to make an audit. I was merely compiling a statement to make the corporation's income tax from the books. The $16,000.00 paid by the company does not appear either in either Petitioner's exhibit 19 or 20 because that was interest which had accrued prior to December 31, 1941.

It did not pay all the interest which had accrued on December 31, 1941. There was still a balance of interest on the books of the company accrued as of December 31, 1941. I do not recall what the balance was but it was in excess of $10,000.00. On December 31, 1941, after there had been applied the $16,000.00 which was paid in 1942, there still remained accrued interest in excess of $10,000.00.

On January 1, 1942, there was an outstanding liability on bonds, principal amount. From January 1 to December 8, 1942, interest was accruing on those bonds, the amount of which accrued interest for the above period was $5,479.49. On December 8th a judgment was entered, which is already in the record, in the sum of some $134,000.00.

On December 23rd a payment was made on that judgment in an amount of $7,310.00. Some $442.00 of that

amount represented accrued interest on the judgment from December 8 to December 23, 1942. The balance of some $6,800.00 represented payment on the principal, from December 23 to December 31, 1942. The books did not so allocate it; I did by referring to the judgment decree, determining what interest the principal amount of the judgment was to carry, paying the interest and taking it from the $7,300.00, gave me the amount of principal to apply. That is how I arrived at the amount of $6,800.00. Interest accrued from December 23 to December 31 on the then balance of the judgment after the payment of the $7,310.00. Hence the statement of Profit and Loss for the year ended December 31, 1942, shows the interest accruing and properly chargeable against the operations of the corporation from January 1 to December 31, 1942. I accrued the interest for the period of January 1 to December 31, 1942 at 8%. I did this because of the stipulation of the judgment, which was the only evidence I was given, which showed the interest rate to be 8%, so I used 8%.

With respect to the Receiver's fees of $2,880.00, that represents the total amount paid as compensation to Mr. Kettering as Receiver from the time of his appointment to December 31, 1942. The $1,500.00 item is included in there. Of the $62,000.00 income tax liability, 25% is payable in March of 1943, which would be approximately between $15,000.00 and $16,000.00. The corporation has tax anticipation warrants with a par value in excess of $20,000.00 with which to meet that payment."

Mr. Keifer: "I would like to make a professional statement. Notwithstanding the testimony, there was not $250.00 paid to Keifer & Keifer in December, 1942. It was for services rendered prior to receivership and paid prior to receivership, and I do not know how the accountant got the information which he got, but there is an error there somewhere."

Mr. Stiefel: "As attorney for the company for services?"

Mr. Keifer: "Rendered prior to the receivership".

Mr. Stiefel: "And the $3,000.00 was paid to you as attorney for whom?"

Mr. Keifer: "The court ordered it paid".

Mr. Stiefel: "Whom did you represent when the court ordered it paid?"

Mr. Keifer: "We represented the plaintiff and were appointed by the court to represent the receiver."

Mr. Stiefel: "In other words, you represented the company up to July and represented the plaintiff who is suing the company after July".

Mr. Keifer: "Yes, sir, if you want to put it that way, under the orders of the court."

Mr. Stiefel: "You were not retained by the court to represent the company in the foreclosure proceeding, were you, Mr. Keifer?"

Mr. Keifer: "No, but the payment was made by order of the court."

MR. W. W. KEIFER, called as a witness on behalf of respondent, having been first duly sworn, testified as follows:

Direct Examination by Mr. Griffith.

I was counsel in the foreclosure of the mortgage in the Court of Common Pleas of Clark County, Ohio. Mr. John M. Cole represented Mr. Gurney and the other parties that he represented. Mr. Cole is an attorney at law of Springfield, Ohio. In July he came to me and said he represented them and we had some discussion of the matter, conferences about it, several, and he said that Mr. Gurney was objecting to the proceeding, and I told him that we expected to ask for judgment, and he wanted that postponed. We finally agreed to let the matter go over until after the summer vacation, which was September. Mr. Cole was given a copy of the Petition, after he spoke to me, and a copy of every paper filed in the case in connection with this foreclosure case as long as he represented Mr. Gurney. Nothing more was said or done about it until the 24th of October, when I saw Mr. Cole and told him that our client thought we ought to take judgment and I proposed to ask for judgment in the case. After some conferences he said "Let it go a little while," and I agreed to. Nothing further was done until the 3rd of December, when I notified Mr. Cole that we proposed to call the matter up to the court and ask for judgment on December 8th. He then told me that he did not represent Mr. Gur-

ney any longer but that he would notify Mr. Stiefel, with whom he was in correspondence, of my notice. In accordance with that notice we went before Judge Davis, of the Common Pleas Court, and asked for judgment in accordance with the pleadings, by default, and Mr. Cole attended. He said he attended because he wanted to explain to the court his connection with the matter. He said he no longer represented Mr. Gurney but that he had notified Mr. Stiefel immediately upon getting a notice from me on the 3rd of December and Mr. Stiefel did not want judgment entered. But Judge Davis said the time had gone along and he thought everybody had had an opportunity and he rendered judgment and approved the entry. A copy of that entry I gave to Mr. Cole that day. He said he wanted to send it to Mr. Stiefel. The papers that they have here today of the proceedings in the foreclosure case are the same papers, I am sure, that I gave to Mr. Cole during the time the case was pending from July up until December. I do not believe there is any other matter I wish to speak about.

Cross Examination by Mr. Stiefel.

I would not know whether I first spoke to Mr. Cole with reference to the foreclosure matter on or about July 22, 1942. His son first spoke to me, but later John Cole spoke to me. He said he was going to make objections, but he never did. He did not say he was going to file an intervening petition. The only meeting we had in Judge Davis' chambers at which Mr. Cole was present was the day we took judgment. Mr. Cole did mention that he was going to ask for the discharge of Mr. Kettering as Receiver because Mr. Kettering was not a resident of the State of Ohio. I don't know that he said he was going to apply for it but he mentioned his being a nonresident of Ohio as an objection to his being Receiver.

The matter went over from July until the fall term. In August I underwent an operation. I don't remember that Judge Davis had an elderly sister who was in her last illness and that he opened court on September 19th and immediately vacated all assignments until the October term. He had a sister who was ill and on account of that he did not hold court for some time. He held some court,

probably just formal matters. I don't know. Mr. Cole did not mention to me on or about December 3rd that Mr. Gurney's father was very ill, that Mr. Gurney could not come down to Springfield at that particular time. I think he said Mr. Stiefel wanted it postponed for that reason, but there had been so many postponements. In July he asked to have it postponed and we agreed to it. In October he asked to have it postponed and I agreed to it.

I think Mr. Murray filed a motion to vacate the foreclosure judgment on January 6th. I do not remember that at the time judgment in the foreclosure suit was entered Judge Davis stated to Mr. Cole that he would not have entered the judgment were it not for the fact that under the law of Ohio he may entertain a motion to vacate the same at any time before the opening of court at the next term, which would not be until January 2, 1943. He said something about there might be an application during term to vacate it if there was ground for it. I do not recall whether Judge Davis stated to Mr. Cole that if a proper showing were made before January 2, 1943, he would be glad to entertain such a motion so as not to preclude the stockholders from offering any legitimate defense they might have."

The Court: "Was there a hearing then?"

The Witness: That was filed just two days before this proceeding was brought."

Mr. Stiefel: "Mr. Murray advised me the motion was made in apt time, as the term was extended until January 9th, and Mr. Murray then presented a motion to vacate."

Mr. Murray? "On January 6th."

Mr. Stiefel: "That has been superseded by this petition."

The Witness: "Yes, I think I know Mr. John M. Cole's signature. I have no doubt this is his signature on Petitioner's exhibit 24 for identification. It looks like it."

The Court: "What is the pertinency of this? This is all over in the State Court."

Mr. Stiefel: "Apparently Mr. Keifer's testimony is directed to the point that we slept on our rights in the state court proceedings. I don't know what other purpose there was to Mr. Keifer's testimony. So my purpose in cross examination is to show that Mr. Cole was there protecting our rights, that none of our rights were slept on

because of anything Mr. Cole did, and I am offering here, or will offer Mr. Cole's letters to me stating just what took place throughout these proceedings in the state court. That is my only knowledge, of course."

The Court: "Is that your claim, that they slept on their rights?"

The Witness: "Yes. They knew about this from the beginning and made no question about the interest, made no question about the voting trust or anything, and all these complaints were open for five months before that judgment was entered and nothing was done."

Mr. Stiefel: "I have voluminous correspondence here from Mr. Cole as to the steps he took and the reasons for various delays."

Mr. H. S. Keifer: "We object to him introducing that stuff. Mr. Cole never filed a paper in the Common Pleas Court."

The Court: "The proper way to get that is to have Mr. Cole testify."

The Witness: "The statement in that letter is not materially different from mine. There was some statement made they might make a motion to set aside the judgment if there was ground for it, and that proceeding would come up if this proceeding does not supersede it, and if there was ground for setting aside the judgment, that is up to the court."

Mr. Stiefel: "As disclosed by this correspondence."

The Court: "Gentlemen, if there is any objection to the correspondence I will have to sustain it. That correspondence is between you and Mr. Cole. I don't think it should be admitted in evidence. I am not sure what position counsel are taking. Would you want to offer that in evidence?"

Mr. Stiefel: "I would, your Honor."

The Court: "If you do, you may have it marked for identification and offer it when you get back to the rebuttal."

Re-direct Examination by Mr. Griffith.

The Witness: "I am able to recall that Mr. Cole made some such statement to the court on the day that the order of sale was taken that he did not see any reason why it should not be granted."

Re-cross Examination.

The Witness: "Prior to July, 1942, I was the attorney for The Western Tool & Manufacturing Company. I don't know whether it was right up to that date or not. I received $250.00 from the company as fees for services rendered prior to July, 1942, and in the year 1942.

In July 1942 I filed a foreclosure action against the company in which I represented the Trustee for the Bondholders, who was in a sense an adverse party to the company. I received $3,000.00 in fees in that foreclosure suit. The $3,000.00 was paid by the Receiver by order of the Court. The foreclosure proceeding has never been completed by the sale of the property but my $3,000.00 for fees on account of services rendered has been paid. There were no more fees than $3,000.00 allowed in that case. By "on account" I mean on account of services in the receivership case. It wasn't paid for any particular time or any particular date. The order of the Court expresses it. We represented the Receiver in that case also by order of the Court. I think the order provides a fee for representing the plaintiff and the Receiver. I won't be certain about that."

Page 144 of exhibit 23 was offered in evidence by respondent.

The Court: "It may be admitted and the Court Reporter may copy it in the record."

Pages 103 and 104 of exhibit 23, being the minutes of the annual meeting of January 26, 1935 and pages 112, 113 and 114 of exhibit 23, being the minutes of the annual meeting of the company of February 1, 1936, were offered in evidence.

The Court: (to Mr. Stiefel) "I will let them be admitted at this time subject to your objection. You may go through them afterward and if you have any objection point it out in your brief."

The Court: "Any rebuttal?"

Petitioners' exhibits 24 to 30 both inclusive, for identification, were offered by Petitioner, being the letters from Mr. Cole to Mr. Stiefel.

The Court: "I will sustain the objection."

The Court: "They will not be competent but you can take Mr. Cole's deposition, if you wish. Or if you wish to

come back you can have him come back and testify, if counsel wish, if you think it is necessary to do either."

Mr. Stiefel: "I wish to say this. At the present moment I certainly do not feel it is necessary to take up any more of the Court's time either by Mr. Cole's testimony or deposition. However, if the Court feels that there is any need for it I will be only too glad to have Mr. Cole's deposition taken and the substance of these letters testified to."

The Court: "I don't want that responsibility put on the Court. Whether or not there is any need for it is a matter counsel will have to determine. I am perfectly willing to grant you opportunity to take his deposition if you wish to. That is up to you."

Mr. Stiefel: "I will ask the Court not to make me decide that question at the present moment. I would want to think it over."

The Court: "Let the Court and Mr. Keifer know within a reasonable time. How long do you want?"

Mr. Stiefel: "Mr. Murray and I can decide that this evening but I would like four or five days."

The Court: "Let me know not later than a week from today whether or not you want to take his deposition. Meantime you can send a notice and let it be taken. Is there anything further in rebuttal?"

Mr. W. W. Keifer: "For the record I think we should make a motion to dismiss the petition on the testimony they have offered."

The Court: "All right."

The Court: "Let it be submitted on briefs. If you are going to wait on the transcript we cannot fix a time now. If you are not going to wait on the transcript, we can fix a time."

Which was all the evidence offered and received upon the hearing of said cause.

Parts of exhibits 22 and 23 which were offered and received in evidence and made a part of the transcript in this cause:

From Exhibit 22—Article 2. P. 5-6.

Constitution and By-Laws.

Article 1. Meeting of Stockholders.

The annual meeting of the Stockholders shall be held at

the Office of the Company, in Springfield, Ohio, on the second Monday in January of each year; and special meetings may be held at such times and places as may be ordered by the Board of Directors. Notice of such annual and special meetings shall be given to each stockholder appearing as such upon the books of the Company, by duly mailing the same to his address ten days prior to the date of the meeting. Three fifths of all the Stockholders shall constitute a quorum.

Article 2. Election of Directors.

The election of Directors shall take place at the annual meeting of Stockholders, or at a speeial meeting called for that purpose, and shall be by ballot; provided, that if such election be not held at an annual or special meeting, it may be held at a stockholders' at which all stockholders are present in person or by proxy. Directors shall be elected for one year, and shall continue in office until their successors are elected and qualified. The number of Directors shall be determined by resolution of the Stockholders but shall not be less than five nor more than fifteen.

FROM EXHIBIT 23—P. 10.

AMENDMENTS TO CONSTITUTION AND BY-LAWS.

Art. 1. Constitution, amended January 1906—The Date of semi-annual Stockholders meeting be changed hereafter to the second Wednesday in July.

Amendment to By-Laws.

Moved by J. W. Tremayne Seconded by Jas. Gurney, Jr., that date of Annual Stock-holders meeting be changed hereafter to the 4th Tuesday in January until further notice.

Amendment to By-Laws.

Moved that Article 2 of Constitution where it states that *all* Stockholders must be either present in person or by Proxy at any Special called of Stockholders for the election of Directors shall be changed to read three-fifths.

FROM EXHIBIT 23—P. 141.

March 28, 1941

The annual meeting of the stockholders of the Western Tool & Manufacturing Company was held in the office of

the company at Springfield, Ohio, Friday morning, March 28, 1941 at ten o'clock. The following were present representing 648-1/2 shares of stock out of 1120-1/2 shares: E. J. Price and W. T. Kettering of Chicago and Wm. J. Grim and Mrs. E. H. Wheeler of Springfield, Ohio.

The minutes of the previous meeting were read and approved.

It was moved by Mr. Kettering, seconded by Mr. Grim, that the following resolution be adopted:

"Be it resolved that the number of directors of the Western Tool & Manufacturing Company be reduced to five, beginning with this annual meeting, held on this date, March 28-1941." This is done in order that a quorum would always be assured. The motion carried.

It was moved by Mr. Kettering—seconded by Mr. Grim, that the rules be suspended and the secretary be authorized to cast a ballot for election of the five directors—namely: E. J. Price, Wm. T. Kettering, James G. Gurney, Wm. J. Grim and Mrs. E. H. Wheeler. The motion carried.

The meeting then adjourned.

E. H. Wheeler, *Secy.*

From Exhibit 23—P. 142.

March 28—1941

Immediately following the annual stockholders' meeting held March 28—1941, a directors meeting was held and attended by E. J. Price, W. T. Kettering, Wm. J. Grim and Mrs. E. H. Wheeler—Mr. Gurney was unable to be present.

Mr. Grim served as temporary chairman and Mrs. Wheeler—secretary.

The minutes of the previous meeting were read and approved.

It was moved by Mr. Price—seconded by Mr. Kettering that the rules be suspended and the secretary authorized to cast a ballot for the election of the same officers as had served the year previous—namely E. J. Price—Pres. W. F. Kettering, Vice Pres., and E. H. Wheeler—Secy., Treas. and Mgr. The motion carried.

The directors then recessed until 2 P.M. The meeting reconvened at 2:30 P. M. with Mr. Price presiding.

The first topic of discussion was tubing for our mandrels and it was agreed that sufficient quantities should be ordered.

The cost of racks was discussed and a change in list prices recommended.

Mr. Grim agreed to see Mr. Ansevin with regard to the rental of our factory space and foundry.

Mrs. Wheeler was requested to ask Mr. Boblitt about renting our planer which he has been wanting to acquire for several years.

Mr. Price and Mr. Kettering agreed to the same compensation for the coming year and it was moved by Mr. Price, seconded by Mr. Kettering that Mrs. Wheeler be paid $35.00 per week, effective April 1, 1941. The motion carried.

A discussion on bond interest followed. It was moved by Mr. Kettering, seconded by Mr. Grim, that a distribution of interest be made as of May-1-1941 amounting to 8%. The motion carried. This—it was stated, will pay * the balance of interest due for the year 1927 at the rate of 6%, and the interest for the full year of 1928 * The treasurer was therefore directed to deposit with the Trust Co. of Chicago a sum necessary to pay the 8% on certificates of deposit with the company.

The meeting then adjourned.

E. H. Wheeler, *Secy.*

* Correction—
2% balance of 1927—all of 1928 at 6% and 1% on 1929

The minutes were read and after correction as above, were approved.

Sept. 6—1941 E. H. Wheeler, *Secy.*

From Exhibit 23—P. 146.

Springfield, Ohio.

The annual meeting of the stockholders of the Western Tool & Manufacturing Company was held in the office of the company at Springfield, Ohio, Friday afternoon, March 27—1942 at four o'clock. The following were present: Mr. E. J. Price, Mr. W. T. Kettering (640), both of Chicago—Mr. W. J. Grim (1), Mrs. Leah Saum (10) and Mrs.

Erna H. Wheeler (7½) of Springfield. Mr. Price presided as Chairman and Mrs. Wheeler served as secretary.

The minutes of the previous meeting were read and approved.

A report was submitted by Mr. Price and a comparison of sales for the past twelve years was made and discussed.

It was moved and seconded that the rules be waived and the same five directors be elected to serve for the current year—namely—Mr. Price, Mr. Kettering, Mr. James G. Gurney, Mr. Grim and Mrs. Wheeler. The motion carried.

Mrs. Saum inquired into the possibility of disposing of her ten shares of stock. Mr. Kettering made her an offer of twenty dollars for her ten shares which she emphatically refused. Mr. Price then promised her that he would do the best possible for her, and get her as much as he could for her stock.

There being no further business—the meeting adjourned.

Erna H. Wheeler
Secretary.

From Exhibit 23—P. 147-148.

Springfield, Ohio.

The annual meeting of the directors of the Western Tool & Manufacturing Company was held Friday afternoon March 27—1942 at five o'clock with four of the five newly elected directors being present namely: Mr. Price—Mr. Kettering, Mr. Grim and Mrs. Wheeler. Mr. Gurney was unable to attend.

The minutes of the previous meeting were read and approved.

It was moved by Mr. Grim—seconded by Mr. Kettering that the rules be suspended and the secretary be authorized to cast a ballot for the election of the same officers as had served the previous year—namely: Mr. Enoch J. Price—President; Mr. W. T. Kettering, Vice-Pres., and Mrs. E. H. Wheeler—Secy., Treas. & Mgr. The motion carried. This completed the organization.

Mr. Price requested that State and Federal taxes be segregated.

The large number of mandrel orders and ways and means of manufacture were discussed at length, and it was decided that Mr. Kettering should go to Wright Field to look into the subject.

With regard to the taking up of certificates of deposit—Mr. Price stated he did not anticipate any offers being made to him in the immediate future. Mr. Price said he thinks it advisable to take in all we can get.

A motion was made by Mr. Kettering, seconded by Mr. Grim that the following resolution be adopted—The motion carried:

"Resolved that the treasurer be authorized to advance to the Bondholders Committee a sum not exceeding one-thousand dollars as may be requested for the expenses of the Committee—proper credit to be given in future settlement between the Committee and the company. At this point the meeting adjourned for the day, until Saturday—March 28, 1942.

The annual meeting of the directors reconvened Saturday morning March 28—at nine o'clock.

It was moved by Mr. Kettering, seconded by Mr. Grim that both Mr. Wagner & Mrs. Wheeler be given an increase of five dollars per week beginning April 1. The motion carried. It was moved by Mr. Grim, seconded by Mrs. Wheeler that Mr. Price be paid $400.00 annually—payable one-hundred dollars quarterly. The motion carried.

The question of painting the factory was brought up and discussed, but nothing definite decided upon.

The directors agreed that the space between the main factory building and forge room should be enclosed—thus providing additional factory space at a low cost.

Mr. Kettering then gave a report on the meeting of manufacturers held at Hotel Gibson Cincinnati on March 26—after which the meeting adjourned.

Erna H. Wheeler *Secy.*

From Exhibit 23—P. 144-5.

Springfield, Ohio.
Sept. 6—1941

A meeting of the five directors of the Western Tool & Mfg. Co., Mr. Price, Mr. Kettering, Mr. Gurney, Mr. Grim

and Mrs. Wheeler, met in the office of Mr. Price in the Conway Bldg., Chicago—on Saturday—September 6—1941.

The minutes of the previous meeting were read and approved, as corrected by Mr. Price.

The Capital Stock tax was discussed at length and it was decided to place the capital stock at $100,000—the tax rate being 1¼%. A motion to this effect made by Mr. Gurney and seconded by Mrs. Wheeler—carried.

Mr. Price suggested that in the balance sheets the Federal and State Taxes be segregated.

The subject of "Priority" was also discussed but nothing definite was determined.

It was suggested that the foundry tenants draw up a lease and submit it to the Board.

It was moved and seconded that Mr. Kettering be authorized to get estimates on a gas engine for power in the factory and submit same to the other members of the Board for approval and authority to proceed with the installation. The motion carried.

It was moved by Mr. Kettering, seconded by Mrs. Wheeler that the president be authorized to take up Certificates of Deposit not exceeding $2500.00 at a price not exceeding 25c on the dollar. The motion carried.

The manager was authorized to secure estimates on a stoker for heating the factory, and upon the approval of Mr. Kettering and Mr. Grim, it is to be purchased and installed.

The motion carried.

It was moved by Mr. Kettering, seconded by Mr. Grim, that we pay 5% interest on bonds which will cover the remaining 2% for May 1929 and 3% for Nov 1—1929. The meeting then adjourned.

E. H. Wheeler—*Secy.*

From Exhibit 23—P. 103-4.

Springfield, Ohio.

The annual meeting of the stockholders of the Western Tool & Mfg. Co., was held in the offices of the company at Springfield, Ohio, Saturday—January 26—1935 at 12M. The following were present: Mr. Enoch J. Price, Mr.

W. T. Kettering—both of Chicago—Mrs. Leah Saum, Mr. O. H. Rust and Mrs. E. H. Wheeler—of Springfield. The following stock was represented:

Mr. Price	640 shares	(Trustee for Bondholders)
Mrs. Saum	10 "	
~~Mr. Rust~~	~~2~~ "	
Mrs. Wheeler	2½ "	
	654½ "	

Stock not represented:

H. Morris	61¾ shares	
J. W. Tremayne	60 "	
Gurneys	73 "	
J. Z. Wells	~~5~~ "	EHW
J. S. Crowell	134 "	
H. T. Hyde	105 "	
O. H. Hyde	2¼ "	
E. K. Stitt	25 "	
	466 "	

It was moved by Mr. Kettering, seconded by Mr. Rust that Mr. Price act as chairman and Mrs. Wheeler secretary. The motion carried thus completing the temporary organization. The minutes of the previous meeting were read and approved.

The secretary was authorized to cast a ballot for the election of the seven directors who had served the previous year, and the election of the following was unanimous: Mr. Price, Mr. Kettering, Mr. James G. Gurney, Mr. Harlan T. Hyde, Mr. O. H. Hyde, Mr. Rust and Mrs. Wheeler.

Mrs. Saum wanted to know why no dividend had been declared for the last fourteen years. This was explained by the secretary.

The meeting then adjourned.

E. H. Wheeler *Secy.*

From Exhibit 23—P. 112-114.

The annual meeting of the stockholders of the Western Tool & Mfg. Co. was held Saturday, February 1, 1936

at the home of the president, Mr. Enoch J. Price—2124 West 112th St., Chicago—

The following stock was represented:

Mr. Price—	640	shares
Mrs. E. H. Wheeler	2½	"

These two officers and Mr. W. T. Kettering were the only ones present, although formal notices were mailed to all stockholders Jan. 14—1936 two weeks in advance of the meeting.

Mr. Price presided and Mrs. Wheeler served as Secretary.

It was moved and seconded that the secretary be authorized to cast a ballot for the election of the seven directors who had served the previous year. The seven directors are Enoch J. Price, Wm. T. Kettering, James G. Gurney, Harlan T. Hyde, O. H. Hyde, O. H. Rust and E. H. Wheeler. The motion carried.

Owing to the small attendance at the meeting no other business was transacted altho a numerous items were discussed, after which the meeting adjourned.

E. H. Wheeler—*Secy.*

Since a quorum of the directors was not present—a directors meeting could not be held. Therefore it was understood that the officers for the previous year should continue until a meeting of the directors could be held.

PETITIONER'S EXHIBIT 1.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, as Trustee,
Plaintiff,
vs.
The Western Tool & Manufacturing Company,
Defendant.
No. 36421.

PETITION.

(Filed July 9, 1942.)

1. The Plaintiff, Owen N. Price, Trustee under a certain Mortgage Deed of Trust hereinafter set forth, says that the Defendant, The Western Tool & Manufacturing Company is a corporation duly organized and existing under the laws of the State of Ohio, with its principal office in the City of Springfield, Ohio.

2. On or about the 1st day of November, 1921, said Defendant for the purpose of borrowing money for the transaction and extension of its business, the funding of its indebtedness, the acquisition of additional working capital and other lawful purposes, pursuant to due authority of its Board of Directors and stockholders, authorized the making and issuing of its coupon bonds to the aggregate amount of $100,000.00, payable in gold coin of the United States of America of the then standard of weight and fineness, and, in accordance with such authority, said Defendant did, for full and adequate consideration by it received, issue and deliver its coupon bonds in the aggregate sum of $90,000.00 to divers persons, whereby said Defendant promised to pay to the bearer of each bond the amount of same at a certain date for each bond, the last maturity date thereof being November 1, 1931, together with interest thereon at eight per centum (8%) per annum from November 1, 1921, on the first days of May and November of each year upon presentation and surrender, as they

severally should mature, of the coupons for such interest annexed to said bonds; and each of the bonds so issued was signed by the President of the Company with the corporate seal of the Company thereto affixed, attested by its Secretary, and authenticated by a certificate endorsed thereon signed by the Trustees of the Mortgage Deed of Trust hereinafter mentioned.

3. On or about the 1st day of November, 1921, said Defendant, pursuant to due corporate action of its Board of Directors and stockholders, duly made and executed under its corporate seal and delivered to The American Trust & Savings Bank, a corporation organized and existing under the laws of the State of Ohio, and Earl K. Stitt of the City of Chicago, Illinois, as Trustees, its certain Mortgage Deed of Trust, dated November 1, 1921, (but actually executed and entered into November 28, 1921), whereby, in order to secure the payment of the principal and interest of all the said bonds at any time issued and outstanding, and to secure the performance of all of the covenants and conditions in said Mortgage Deed of Trust, it granted, conveyed, assigned and transferred to said The American Trust & Savings Bank and said Earl K. Stitt as Trustees and their successor or successors in the trust thereby created, the following described real estate:

• • • • • • • • • • •

5. (f) It was further provided that in case default should be made in the payment of principal or interest on any of such bonds and such default continue for a period of 30 days, or in case default should be made in the due observance or performance of any other covenant or condition of said Mortgage to be performed by the Defendant and any such default should continue for 30 days after written demand by the Trustees for performance thereof, then in such case the Trustees personally or by attorney and in their discretion might:

(1) Enter upon the mortgaged property and exclude the Defendant therefrom, might use, operate and manage the same and in general carry on the business of Defendant as fully as it might have done if in possession thereof, including the maintaining and restoring, and insuring said property as was usual with companies of like character, and collect and receive all earnings, incomes and profits

of the same, using the moneys arising therefrom in payment of interest and principal of said bonds; or,

(2) Might, and, upon request of holders of one-fourth in amount of said bonds and upon being indemnified to their satisfaction, should by suit or suits in equity or at law proceed for foreclosure of said Mortgage or for the enforcement of any other appropriate legal or equitable remedy to protect and enforce their rights and the rights of said bondholders.

And further, that in case of default in payment of principal or interest, continuing for thirty days, upon demand, the Trustees would be entitled to recover judgment for the amount due.

* * * * * * * * * * *

5. (h) It was further provided that in the event of a proceeding to foreclose said Mortgage the Trustee should as a matter of right and without reference to the adequacy of the security for said bonds and without regard to the solvency of the maker thereof be entitled to have a receiver appointed for the mortgaged property and the rents, issues, incomes and profits thereof, and such receiver might be appointed in such proceeding forthwith or at any time and without notice to said Defendant and during the period of such receivership such receiver should collect the rents, issues, income and profits of the mortgaged property and apply same to the payment of the expenses of operating the same, taxes, assessments and insurance premiums thereon, the repairs and maintenance thereof and the surplus, if any, upon the mortgage debt.

* * * * * * * * * * *

7. Interest upon the $90,000.00 of bonds issued as aforesaid was paid up to the 1st day of May, 1923 at the rate of 8 per centum per annum; upon $89,700.00 of said bonds at the rate of 6½ per centum from May 1, 1923, to May 1, 1924, and upon $89,700.00 of bonds at the rate of 6 per centum per annum from May 1, 1924, to November 1, 1929.

Thereafter the Defendant purchased $16,600.00 face value of said bonds and thereby the same were canceled, and thereafter, on June 16, 1942, the Company paid to the Bondholders' Protective Committee, (hereinafter referred to) the sum of $16,000.00 to be applied upon bonds held by that Committee.

8. On or about November 1, 1923, a Bondholders' Protective Agreement was entered into by the holders of $89,700.00 of said issued bonds, (being all of the issued bonds except three bonds of $100.00 each,) and thereby a Committee, consisting of Charles S. Deneen, Chairman, W. T. Kettering, Edward I. Bloom, W. D. Hollister and E. J. Price, Secretary, was constituted to whom were transferred all of said $89,700.00 of bonds with power to control same as the legal owners thereof. Said bonds were deposited with a depositary and certificates of deposit therefor were duly issued. The payments of interest at a rate less than that specified in the bonds and Mortgage for the time as above stated were made by agreement with said Committee.

• • • • • • • • • • •

11. The holders of more than one-fourth of said bonds now outstanding have in writing requested and directed the Plaintiff as such Trustee to proceed and enforce the rights of said bondholders under said Mortgage Deed of Trust by bringing this suit for foreclosure of said Mortgage and for the enforcement of such other appropriate remedies as may be deemed most effectual to protect and enforce such rights, including the appointment of a receiver for the property and assets of said Company.

12. By reason of the premises default has been made in compliance with the terms and conditions of said bond and the conditions of said Mortgage have become and are broken; that by reason thereof the Plaintiff has become entitled to take possession of the mortgaged property and all current assets and to exclude the Company therefrom, and is entitled to bring this action for the foreclosure of said Mortgage.

13. This is an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property, and said mortgaged property is in danger of being lost or materially injured, the condition of the Mortgage has not been performed and the mortgaged property is insufficient to discharge the mortgage debt; and therefore the Plaintiff is entitled to have a receiver for the property of the Defendant appointed herein in compliance with the terms and stipulations of said Mortgage Deed of Trust.

14. Plaintiff further says that the Defendant in the operation of its factory and plant is actively engaged in

the production of war materials and equipment for the production of war materials and munitions for the armed forces of the United States under contracts with the Government and under sub-contracts with contractors with the Government of the United States and the continuance of the operation and production of said war materials is necessary and required by the Government of the United States for the proper carrying on of the war by the armed forces of the Government.

• • • • • • • • • • •

16. Wherefore, the plaintiff prays:

• • • • • • • • • • •

(c) That said Mortgage may be foreclosed by proper decree of this Court;

• • • • • • • • • • •

(e) That pending this suit the Court appoint a receiver for all the property, real and personal, and of whatever nature, of the Defendant, The Western Tool & Manufacturing Company, with appropriate powers to protect and manage the same, to take inventory thereof, to collect the debts and accounts due to Defendant, to continue and carry on the business of said Company and to exercise such other powers as may be necessary and appropriate in the premises;

• • • • • • • • • • •

PETITIONER'S EXHIBIT 2.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, Trustee,
Plaintiff.

vs.

The Western Tool & Manufacturing Company,
Defendant.

ANSWER.

(Filed July 13, 1942.)

Now comes the Defendant, The Western Tool & Manufacturing Company, and waives the issuing and service of summons for it, and enters its appearance in this action.

This Defendant admits the truth of all the allegations in the Petition herein and consents to the appointment of a receiver herein as prayed for in the Petition.

W. H. GRIFFITH,
Attorney for Defendant.

State of Illinois, }
County of Cook, } ss.

Enoch J. Price, being first duly sworn, says that the above named Defendant, The Western Tool & Manufacturing Company, is a corporation; that he is the President of said corporation, duly authorized in the premises and that the statements in the foregoing Answer of said Defendant are true as he believes.

ENOCH J. PRICE.

Sworn to and subscribed before me this ..... day of July, 1942.

GEORGE A. MARTIN,
Notary Public,
Cook County, Ill.

PETITIONER'S EXHIBIT 3.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, as Trustee,
Plaintiff.
vs.
The Western Tool & Manufacturing Company,
Defendant.
No. 36421.

AMENDMENT TO ANSWER.

(Filed July ...., 1942.)

Now comes The Western Tool & Manufacturing Company and by way of Amendment to and additional Answer herein says that the $300.00 of bonds mentioned in paragraphs 8 and 9 of the Petition herein are barred by the Statute of Limitations since they became due more than 15 years prior to the beginning of this suit and no payments either of principal or interest have been made thereon since the payment of interest thereon on or about May 1, 1923, and more than 15 years prior to the beginning of the suit.

Wherefore, the Defendant asks that no judgment or decree be made herein for the recovery of said bonds or for the payment of any principal or interest thereon.

.....
(Wm. H. Griffith)
Attorney for Defendant.

State of Illinois, }
County of Cook, } ss.

Enoch J. Price, being first duly sworn, says that the above named Defendant, The Western Tool & Manufacturing Company is a corporation; that he is the President

of said corporation, duly authorized in said premises, and that he believes the statements in the foregoing Amendment to the Answer are true.

.....

Sworn to and subscribed before me this ..... day of ..... 1942.

.....

Notary Public.

PETITIONER'S EXHIBIT 4.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, as Trustee,
Plaintiff,
vs.
The Western Tool & Manufacturing Company,
Defendant.
No. 36421.

ENTRY OF JUDGMENT AND ORDER OF FORECLOSURE.

This day this cause, having been regularly assigned for trial, came on for hearing upon the Petition, the Answer, the Amendment to the Answer of the Defendant and upon the evidence and was submitted to the Court. Upon consideration whereof the Court finds that the Defendant has been duly served with summons herein, has entered its appearance and filed an Answer admitting the truth of all the allegations of the Petition herein; that the averments of the Petition and of the Amendment to the Answer are

true and that there is due from the Defendant upon the bonds set forth in the Petition, including interest at eight (8) per cent per annum to this date, the sum of One Hundred Thirty Four Thousand Six Hundred Ninety Eight and 21/100 ($134,698.21) Dollars; that three of said bonds, being Nos. 98, 99 and 100, each for $100.00, are barred from any recovery against the Defendant by the statute of limitations in accordance with the averments of the Amendment to the Answer herein; that the Plaintiff as Trustee for said bondholders is the owner and holder of the mortgage upon the property and assets of the Defendant, as set forth in the Petition, and the same is a valid first lien upon said property; and that the Plaintiff is entitled to have the said mortgage foreclosed and the property herein described sold for the purpose of paying the said amount due upon said bonds.

It is therefore by the Court CONSIDERED AND ADJUDGED that the Plaintiff, Owen N. Price as Trustee recover of the Defendant, The Western Tool & Manufacturing Company the sum of One Hundred Thirty Four Thousand Six Hundred Ninety Eight and 21/100 ($134,698.21) Dollars, the same to bear interest from this date at the rate of eight (8) per cent per annum.

It is further ORDERED AND DECREED that unless the Defendant, The Western Tool & Manufacturing Company, shall within three (3) days from this date pay or cause to be paid to the Plaintiff the sum hereinabove found due and to the Clerk of this Court the costs of this action, the Defendant's equity of redemption be foreclosed; that the real estate and property described in the Petition be sold and that an order of sale issue therefor to the Sheriff of Clark County, Ohio, directing him to cause to be appraised, advertised and sold as upon execution the following described property, towit:

Situate in the City of Springfield, County of Clark and State of Ohio:

Being part of the southeast quarter of Section Number Twenty-eight (28) of Township Number Five (5), in Range Number Nine (9), M. R. S.; beginning at an iron pin in the north marginal line of Pleasant Street and at the southeast corner of a lot formerly owned by The Owen Machine Tool Company; said point being

five hundred thirty-nine and five tenths (539.5) feet from an iron pin at the point of intersection of the north marginal line of Pleasant Street with the east marginal line of Burt Street; thence northeastwardly with the east line of said Owen Machine Tool Company three hundred ninety-six and ninety-five hundredths (396.95) feet to an iron pin in the south right of way line of the Detroit, Toledo & Ironton Railroad; thence southeastwardly with said right of way line one thousand one hundred thirty-eight and twenty-five hundreths (1138.25) feet, more or less, to an iron bar in the west line of Belmont Avenue; thence with the west line of Belmont Avenue, in a southwesterly direction three hundred sixty-one and five-tenths (361.5) feet to an iron bar in the north line of Pleasant Street; thence with the north line of Pleasant Street, in a northwesterly direction one thousand one hundred thirty-four and seventy-five hundredths (1134.75) feet, more or less, to the place of beginning, containing nine and ninety hundredths (9.90) acres, and being the same premises conveyed to The Western Tool & Manufacturing Company by three separate deeds from I. Ward Frey, Trustee, et al., recorded respectively in Volume 159, pages 257 and 258, Volume 159, pages 255-257, and volume 208, pages 583-585, of Deed Records of Clark County, Ohio.

All other real estate, leaseholds, chattels, real and equitable and other interests in real estate which the Defendant now owns.

Also, all buildings, structures, erections and constructions now placed on the above described real estate, with their fixtures and appurtenances.

Also, the existing plants and factories of the Defendant located on said real estate and any and all additions to and extensions of the said plants and factories, and all of the engines, boilers, belting, shafting, fixed and movable machinery, with their spare parts and attachments, fans, blowers, awnings, steam, gas and water pipes, blast and shaving pipes, all steam and heating apparatus, gas fixtures, ovens, melting furnaces, stacks, cupolas, forges, fire extinguishers, hose and fire apparatus, electric light, power, welding

and heating apparatus, operating machines with their spare parts and attachments, gearing, dies, plating apparatus, pipe machines, patterns and flasks, trolleys and carriers and motors; core machines, arbors, lathes, planers, drill presses, railway tracks, ties, rails, frogs, and switches; cars and tramways; all equipment and appliances of a permanent character owned by the Defendant for use in the operation of said existing and future plants and factories, and the additions thereto and extensions thereof; it being expressly understood that any and all property covered by the foregoing description should be considered as fixtures and appurtenances constituting part of the real property of the Defendant.

Also all patents, trade-marks, trade names, trade designations, trade brands, trade processes, formulae, copyrights, and subjects of copyrights owned by the Defendant.

Also, all the rights, privileges, franchises and immunities of the Defendant, including the right to be a corporation, in so far as they could be lawfully transferred, and all of the good-will and the right to the name of the Defendant.

Also all of the rents, issues, income and profits of the described or referred to property.

Reserving however all cash, moneys and bills, and accounts receivable due to the Defendant or the Receiver herein, which are not to pass by said sale.

PETITIONER'S EXHIBIT 5.

IN THE DISTRICT COURT OF THE UNITED STATES,
IN AND FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

In the Matter of The Western Tool & Manufacturing Co., a corporation,	In Proceeding for the Reorganization of a Corporation. No. 9061.

MOTION OF OWEN N. PRICE, TRUSTEE FOR BONDHOLDERS.

(Filed February 5, 1943.)

Now comes Owen N. Price and says that he is the duly constituted Trustee for bondholders under the Mortgage Deed of Trust, dated November 1, 1921, executed by said The Western Tool & Manufacturing Co., and recorded in Volume 133, page 17, *et seq.*, of Mortgage Records of Clark County, Ohio, (having been duly constituted and appointed such Trustee in succession to the original trustees named in said Mortgage Deed of Trust); that said Mortgage Deed of Trust secured the payment of an issue of bonds payable to bearer in an authorized amount of $100,000.00, of which only $90,000.00 were issued and of said last named amount there are now outstanding $73,400.00 in amount; all of which are now owned by the Bondholders' Protective Committee organized under an agreement of November 1, 1923, (under which agreement said bonds were more than fifteen years ago assigned and transferred to said Committee with full power to enforce all rights under said bonds,) except that $300.00 of said bonds were owned by persons unknown to the Committee, to the Company and to this Trustee, were not so deposited and transferred and have not been presented for payment of interest or otherwise heard of for more than twenty years; on account of which situation it has been adjudicated and determined in the suit pending in the Court of Common Pleas of Clark County, Ohio, for foreclosure of said Mortgage Deed of Trust, upon a plea by said Company, that said $300.00 of bonds were barred by the statute of limitations and that

there was no right to recover thereon or share on account thereof in the proceeds of the mortgaged property; that the debt due to said bondholders has been reduced to judgment in the case of *Owen N. Price, Trustee,* v. *The Western Tool & Manufacturing Co.,* No. 36421, in the Court of Common Pleas of Clark County, Ohio, which judgment was rendered December 8, 1942, in the sum of $134,698.21, to bear interest from that date at 8 per cent per annum, upon which judgment there was paid $7,310.00 on December 23, 1942, by said Receiver in accordance with the order of said Common Pleas Court.

The Mortgage Deed of Trust above referred to is very voluminous, consisting of 55 pages, and no copy is filed herewith but the original will be submitted at the hearing hereof or earlier at the order of the Court.

This Trustee further says that he has not been served with any notice or copy of any order in this proceeding.

This Trustee now moves the Court to dismiss the Petition herein for the following reasons:

First: The Petition herein was filed without the authority of said The Western Tool & Manufacturing Co. or its Board of Directors and without the knowledge, assent or authority of any of its officers or any of its directors other than James G. Gurney.

Second: It is unreasonable to expect that a plan of reorganization of said corporation can be effected; in fact it is plainly impossible to effect a reorganization since there are no unsecured creditors and, apart from taxes to the State of Ohio and to the United States, there is but one class of creditors, all of the valid and outstanding bonds secured thereby, $73,100.00 in amount, being held by the one secured creditor, to wit: the said Bondholders' Protective Committee.

Third: A prior proceeding is pending in which interests of parties will be best subserved.

Fourth: The Petition herein was not filed in good faith.

This Motion is to be supported by affidavits or by oral testimony, if so directed by the Court.

OWEN N. PRICE,
Owen N. Price,
Trustee as aforesaid.

KEIFER & KEIFER,
Keifer & Keifer,
Attorneys for said Trustee.

State of Illinois }
County of Cook } ss.

Owen N. Price, being first duly sworn, says that the statements in the foregoing Motion are true, as he verily believes.

OWEN N. PRICE.

Sworn to and subscribed before me this 20th day of January, 1943.

RUTH C. NETTLAND,
Notary Public.

PETITIONER'S EXHIBIT 6.

(Letterhead of)

ENOCH J. PRICE AND OWEN N. PRICE
Attorneys and Counselors
Suite 1406 Conway Building
111 W. Washington St.
CHICAGO

May 22, 1941

Judge H. E. Oxford
Lakeland, Florida
Dear Sir:

I have yours of May 14 in regard to the Western Tool and Manufacturing Co. business and note with interest and satisfaction your explanation of your motive in writing in regard to this business.

I appreciate having somebody representing the old stock holders show a real interest in this business. This is the first manifestation we have had for a number of years—in fact, the representatives of the bond holders who own no stock have managed the business almost without assistance since the old manager, Henry Morris, died about 1930 or 1931. At that time business was at a very low state and instead of employing a new general manager,

we arranged with Mrs. Wheeler, who was Mr. Morris' secretary and office manager, to assume also the duties of the general manager without advance of salary and thus we cut expenses so that we could live through the lean years of the depression but we have had no financial assistance from any of the stock holders during all this period.

The result is that while we have an organization that can make money in a small way, we have not an organization which could be increased materially for the reason that we have not and do not know where we could get a competent general manager with the experience necessary to install new machinery and undertake new projects. Mrs. Wheeler, our present general manager, is handling the present business very well and is very dependable but the expanding of the business and taking new contracts for different articles than we have been accustomed to manufacture, I think, would be unwise and hazardous at the present time. As a matter of fact, the condition of the business and the necessity for the bond issue, which the Committee represents, grew out of doing that very thing during the World War. At that time they had what was regarded as a very competent and experienced Board of Directors and experienced general manager. Government contracts were taken and machinery was purchased and many new men employed but the taxes spread against profits, etc. drained the company, so that this bond issue was necessary to meet loans which they had made at the local banks in their expansion. As a result, the company has never gotten on its feet again and even if it succeeds in paying off the present bond issue, there will have to be additional money, personnel and talent put in the business to make it succeed.

Even the small amount of money we have been able to get ahead and are beginning to use now for the payment of interest, would go a very little way in financing the company for a program under which it could take large contracts and we of the Bond Holders Committee regard that as a hazardous program which we ought not to take in view of the indebtedness.

Accordingly, our right policy seems to be to expand the business just as much as we can in the things which we are manufacturing and which we have a reputation for. Our

small tools are having a very good demand and are largely going into the rearmament program for equiping factories, battle ships, etc. with small tools that they need. We would be glad to increase this business though if it increased very largely, we might have difficulty with the labor situation, though that is a chance we would be willing to take as some of the articles can be manufactured with comparatively unskilled labor, although our more important articles require labor which is highly skilled and with a long period of training to make them satisfactory.

We have wished for a long time to find somebody who wanted the factory and who would put in the necessary money to pay off the bond issue, even at a heavy discount, and then put necessary money in the factory and develop it but have not been able to locate such parties and think it unlikely that any party of this character will appear, even during this period. We have had the property at different times in the hands of local real estate agents at Springfield but they have never presented a good prospect to take over the property and accordingly we have carried it on as best we could with the resources which we had and taking care of the market which existed for our tools.

You may not get much encouragement out of this letter but at least you will understand the attitude of the present management. Personally, nothing would give me more satisfaction than turning the business back to the old stock holders if a reasonable settlement could be worked out with the bond holders. I am reaching an age when attending to business at Springfield is more or less a burden and we have all gotten more or less tired of the proposition but have had to stick to it, we thought, or lose heavily by closing down the business, as the good will is certainly quite valuable.

If either you or Mr. Hyde have any suggestions after reading this letter, I would be glad to hear them.

Very truly yours,

Enoch J. Price.

EJP:RN

PETITIONER'S EXHIBIT 7.

(Letterhead of)

ENOCH J. PRICE AND OWEN N. PRICE

Attorneys and Counselors

Suite 1406 Conway Building

111 W. Washington St.

CHICAGO

June 26, 1941

Judge H. E. Oxford
Lakeland, Florida

Dear Sir:

Your letter of May 28 duly received and considered and I had intended to answer it sooner.

You suggest a possibility whereby you would satisfy the bondholders and reinstate the business in the hands of the stockholders and you ask what, in my opinion, it would cost to satisfy these bonds.

I have only the most indefinite idea but the situation on the bonds stands about this way. The company has picked up itself at a high discount about $13,000 face of the $90,000.00 issue, leaving about $77,000 outstanding, on which the unpaid interest will be about fifty per cent based on the plan of the Committee to reduce the unpaid interest rate to four per cent. That is to say, there would be say about a total of $115,000 all told due. I have only my own judgment on which to base a guess but in view of all the circumstances, I imagine that an offer to pay par for these bonds without interest would take practically all of them. It may be by careful handling enough could be bought below par to balance any cases where more than par had to be paid.

This estimate, as suggested, is only my own judgment. The ideas of bondholders since we have commenced paying interest again may be much different then I think but judging human nature, I would be surprised if par would not handle the whole issue.

I will be glad to keep in touch with you if you desire to work out a plan for taking these up as my files and knowl-

edge of addresses would be essential in any arrangement for picking up these bonds.

I might mention that there are some other parties who have looked over the plant and have a similar thought in mind to yours but whether they will make any concrete proposition or not, I do not know as yet.

Very truly yours,

ENOCH J. PRICE.

EJP:RN

PETITIONER'S EXHIBIT 8.

(Letterhead of)

ENOCH J. PRICE AND OWEN N. PRICE

Attorneys and Counselors

Suite 1406 Conway Building

111 W. Washington St.

CHICAGO

Aug. 28, 1941

Mr. Harlan T. Hyde
310 E. Main St.
Lakeland, Fla.

My Dear Hyde:

A letter from Mrs. Wheeler reminds me that at the annual meeting of The Western Tool this spring we changed the by laws by reducing the no. of directors to five, Gurney, Kettering, Grim, Mrs. Wheeler and myself. As you haven't been able to attend for a couple of years we thought it best to have only directors who could be relied on to attend meetings.

Accordingly, if you were planning to attend the directors' meeting on Sept. 6th, you can cancel the date. I will write you after the meeting advising you of action taken and will be glad to hear from you as to any suggestions you may have as to the work of the factory or the handling

of the debt. You can write to my office or my home address below. Haven't begun going back to my office yet but will next week.

Very truly yours,

ENOCH J. PRICE,
2124 W. 112th St.,
Chicago, Ill.

PETITIONER'S EXHIBIT 9.

(Duplicate.)

(Letterhead of)

WINTERS, PRICE & STEVENS

Attorneys and Counselors

Suite 1053 Conway Building

111 W. Washington Street

CHICAGO

October 18, 1923.

CERTIFICATE OF BENEFICIAL OWNERSHIP
OF COMMON STOCK OF
THE WESTERN TOOL AND MANUFACTURING COMPANY

The undersigned hereby certify that James Gurney Jr. is the equitable or beneficial owner of 59 shares of the common stock of The Western Tool and Manufacturing Company, which have been assigned and transferred to the undersigned under a voting trust agreement dated July 20, 1923. The undersigned are the legal owners as trustees for said depositor of said shares, but said depositor or his assigns or legal representatives shall receive all dividends paid on said shares, but they shall have no right to vote said shares at any meeting of stockholders during the life of said trust agreement.

This certificate is transferable by assignment duly registered upon the books of said corporation.

.....
.....
.....
} *Trustees.*

ENOCH J. PRICE.

Chicago, Illinois, Oct. 19, 1923.

PETITIONER'S EXHIBIT 10.

CERTIFICATE OF BENEFICIAL OWNERSHIP
OF THE COMMON STOCK OF
THE WESTERN TOOL AND MANUFACTURING COMPANY

The undersigned hereby certifies that Edward S. Thomas is the equitable or beneficial owner of 443½ shares of the common stock of The Western Tool and Manufacturing Company which has been assigned and transferred to Charles S. Deneen, W. T. Kettering, W. D. Hollister and E. J. Price, as a Committee under a voting trust agreement dated July 20, 1923. The said Committee are the legal owners as trustees for said depositor of said shares, but said depositor or his assigns or legal representatives shall receive all dividends paid on said shares, but they shall have no right to vote said shares at any meeting of stockholders during the life of said trust agreement.

ENOCH J. PRICE,
Secretary of Committee.

Chicago, Illinois, April 26, 1928.

For value received I hereby sell, assign and transfer unto Harlan T. Hyde all my interest under the foregoing certificate in 443½ shares of the capital stock referred to by the within certificate and do hereby irrevocably constitute and appoint Enoch J. Price to transfer the said stock

on the books of the within named Committee with full power of substitution, in the premises.

EDWARD S. THOMAS.

Dated April 30, 1928.

Entered on books of Bondholders Committee May 2, 1928.

ENOCH J. PRICE, *Secy.*

PETITIONER'S EXHIBIT 11.

(Letterhead of)

THE WESTERN TOOL AND MANUFACTURING CO.

Manufacturers of

"CHAMPION" TOOLHOLDERS

Expanding Mandrels, Toolholder Steels,
Emery Wheel Dressers & Cutters
Shop Equipment, Vises, Etc.

SPRINGFIELD, OHIO, U.S.A.

March 14, 1941.

Mr. H. T. Hyde,
Lakeland, Florida.

Dear Harlan:—

Answering your favor of the 12th inst., you may not know that we are getting about all the Government orders we can handle with the equipment that we have, and the purchase of additional equipment is, I believe, out of the question at present. Prices are beyond reason for both new and used machinery. I do not really believe that a trip to Washington at this time by you and your attorney would benefit us much.

To make any item on a production basis would require new and up-to-date machinery. Our machinery, as you well know, is old and quite out of date, but I feel that we are doing quite well under the circumstances.

I have taken the liberty of referring your letter to Mr. Price, and you will hear from either him or me a little later on.

Sincerely,

THE WESTERN TOOL & MFG. CO.,
By ERNA H. WHEELER.

PETITIONER'S EXHIBIT 12.

(Letterhead of)

THE WESTERN TOOL AND MANUFACTURING CO.

March 17, 1941.

Mr. Harlan T. Hyde,
Lakeland, Florida.

Dear Harlan:—

The annual meeting of the stockholders and directors of the Western Tool & Mfg. Company will be held in the offices of the company at Springfield, Ohio, Friday Morning, March 28 at ten o'clock.

Inasmuch as nothing of importance will be brought up at the meeting, it will not be necessary for you to attend.

Yours cordially,

THE WESTERN TOOL & MFG. CO.,
E. H. WHEELER,
Gen'l Manager.

EHW/11

PETITIONER'S EXHIBIT 13.

(Letterhead of)
THE WESTERN TOOL AND MANUFACTURING CO.

Mr. H. T. Hyde, March 31, 1941.
Lakeland, Florida

Dear Harlan:—

Enclosed you will please find balance sheet as of March 31, 1941.

We had our annual meeting last Friday and only four were present: Mr. Price, Mr. Kettering, Mr. Grim and myself. Jim Gurney was unable to attend.

A resolution was adopted reducing the number of directors to five, and the following were named on the board: Mr. Price, Mr. Kettering, Mr. Grim, Jim Gurney and Erna Wheeler. This was done so that we would always be able to have a quorum present. Nothing of any importance was transacted. Mr. Price was re-elected president, W. T. Kettering- Vice-Pres., and E. H. Wheeler, Secy., Treas. & Mgr.

Business continues good, and we have about all that we can take care of.

Kind regards and best wishes—

Sincerely,

ERNA H. WHEELER

PETITIONER'S EXHIBIT 14.

(Letterhead of)
THE WESTERN TOOL AND MANUFACTURING CO.

Mr. Harlan T. Hyde, May 13, 1942.
Lakeland, Florida.

Dear Harlan:—

Enclosed you will please find balance sheets for the last two months. Please pardon the oversight; it will not happen again.

We had a meeting the last Saturday in March, and I have just discovered that a notice of same was not mailed to you. I guess it does not matter much, however, for I am always requested to tell you that it will not be necessary for you to make the trip North.

There were only four of the five directors present; Jim Gurney was unable to attend. Nothing of any importance transpired.

We are extremely busy here and everything seems to be moving along very nicely.

Kind regards and best wishes—

Sincerely—

ERNA H. WHEELER

PETITIONER'S EXHIBIT 15.

The Western Tool & Manufacturing Co.
Springfield, Ohio.

The undersigned shareholders, being the owners and holders of a majority of the outstanding shares of THE WESTERN TOOL & MANUFACTURING CO., hereby demand that you forthwith file a petition under and pursuant to the provisions of Chapter X of the Acts of Congress relating to Bankruptcy for the relief of your corporation and for a stay of the pending proceedings against you in the Court of Common Pleas of Clark County Ohio, designated as Owen N. Price, Plaintiff, vs. The Western Tool & Manufacturing Co., a corporation, defendant, and designated as No. 36421.

Upon your failure to advise either of our attorneys, viz: Mr. George R. Murray, Callahan Bank Building, Dayton, Ohio and Charles W. Stiefel, Jr., 30 N. LaSalle St. Chicago, Illinois, within three (3) days from date hereof of your willingness to forthwith file such proceeding, the under-

signed will take such steps as they deem to be necessary and advisable for the institution of such proceeding.

HARLAN T. HYDE
JAMES GURNEY (also known as JAMES GURNEY, JR.)
STELLA GURNEY
JAMES G. GURNEY
By: JAMES G. GURNEY,
Attorney in Fact.

Jan. 6, 1943 10:35 Mrs. Wheeler — Wm. T. Kettering Present

PETITIONER'S EXHIBIT 16.

VOTING TRUST AGREEMENT

THE WESTERN TOOL AND MANUFACTURING COMPANY.

THIS AGREEMENT, entered into as of the 20th day of July, 1923, between Henry Morris, James G. Gurney and Edward S. Thomas, of the first part, and Charles S. Deneen, W. T. Kettering, W. D. Hollister and Enoch J. Price, of the second part, witnesseth:

That, whereas said parties of the first part are owners of certain shares of the capital stock of The Western Tool & Manufacturing Co., and said parties of the second part are members of the bondholders' committee appointed by the holders of the bonds of an issue of $100,000 made by said company under date of November 1, 1921, which committee was appointed to protect the interests of said bondholders; and

Whereas said committee is willing to proceed to cause said bond issue to be refunded at a lower rate of interest with more favorable terms of payment than the present, provided it is enabled to control, the policy of said company pending the payment of such refunded bond issue;

Therefore, in order to enable said bondholders' committee to so control the policies of said corporation pending the payment of said bonds, said first parties have delivered to said committee certificates of stock of said The Western Tool & Mfg. Co., as follows:

Henry Morris	shares 87.50
Edward S. Thomas	443 ½
James G. Gurney, JR.	75
Total,	606.00

Said second parties shall cause said shares to be transferred into their joint names as Trustees on the books of the corporation, and they shall continue to hold all said shares pending the payment in full of the refunding bond issue to be arranged for by said committee with full and exclusive right to vote the same at all stockholders meetings of said corporation while so held, as such trustees or a majority of them shall determine. Said Trustees or any one of them may act by a duly appointed proxy in the voting of said shares.

In case any dividend shall be declared on said shares during the life of this agreement, the same shall be paid to the depositors of said shares, respectively, or to their assigns or legal representatives; said Trustees shall not have any interest in or right to any dividend declared on said stock while it is held by them.

The interest of the depositors of said shares of stock respectively may be sold or assigned, and, if requested by any depositor, said second parties shall issue to him a certificate of the shares belonging to such depositor, which certificate shall be assignable to the same extent and in the same manner as the stock certificates so deposited.

When the purpose of this voting trust is fully accomplished by the payment or extinguishment of said bond issue, or in the event that said bondholders committee should fail to secure the refunding of said bond issue, said parties of the second part shall cause said shares to be returned to the depositors or their assigns or legal representatives and transferred on the books of said corporation.

In case any one or more of said second parties should resign, die or refuse to act, the remaining members shall

have full power in all respects to act for all in voting said stock and re-delivering it to the proper parties.

Witness our hands and seals the day and year above written.

Witness E. C. TREMAYNE EDWARD S. THOMAS

.....

.....

.....

Bondholders Com. ENOCH J. PRICE, *Secy.*

.....

.....

.....

PETITIONER'S EXHIBIT 17.

VOTING TRUST AGREEMENT.

THE WESTERN TOOL AND MANUFACTURING COMPANY

This agreement, entered into as of the 20th day of July, 1923, between Henry Morris, James Gurney, Jr. and O. H. Hyde, of the first part, and Charles S. Deneen, W. T. Kettering, W. D. Hollister and Enoch J. Price, of the second part, witnesseth:

That, whereas said parties of the first part are owners of certain shares of the capital stock of The Western Tool & Manufacturing Co., and said parties of the second part are members of a bondholders' committee appointed by the holders of the bonds of an issue of $100,000 made by said company under date of November 1, 1921, which committee was appointed to protect the interests of said bondholders; and

Whereas said committee is willing to proceed to cause said bond issue to be refunded at a lower rate of interest with more favorable terms of payment than the present provided it is enabled to control the policy of said company pending the payment of said refunded bond issue;

Therefore, in order to enable said bondholders' committee to so control the policies of said corporation pending the payment of said bonds, said first parties have delivered to said committee certificates of stock of said The Western Tool & Mfg. Co., as follows:

Henry Morris	shares	87.50
O. H. Hyde	"	440
James Gurney, Jr.	"	75
Total		602.50

Said second parties shall cause said shares to be transferred into their joint names as Trustees on the books of the corporation, and they shall continue to hold all said shares pending the payment in full of the refunding bond issue to be arranged for by said committee with full and exclusive right to vote the same at all stockholders' meetings of said corporation, while so held, as such trustees or a majority of them shall determine. Said Trustees or any one of them may act by a duly appointed proxy in the voting of said shares.

In case any dividend shall be declared on said shares during the life of this agreement, the same shall be paid to the depositors of the said shares, respectively, or to their assigns or legal representatives; said trustees shall not have any interest in or right to any dividend declared on said stock while it is held by them.

The interest of the depositors of said shares of stock respectively may be sold or assigned, and, if requested by any depositor, said second parties shall issue to him a certificate of the shares belonging to such depositor which certificate shall be assignable to the same extent and in the same manner as the stock certificates so deposited.

When the purpose of this voting trust is fully accomplished by the payment or extinguishment of said bond issue, or in the event that said bondholders committee should fail to secure the refunding of said bond issue, said parties of the second part shall cause said shares to be returned to the depositors or their assigns or legal representatives and transferred on the books of said corporation.

In case any one or more of said second parties should resign, die or refuse to act, the remaining members shall have full power in all respects to act for all in voting said stock and redelivering it to the proper parties.

Witness our hands and seals the day and year above written.

JAMES GUENET, JR.

PETITIONER'S EXHIBIT 18.

BONDHOLDERS' PROTECTIVE AGREEMENT.

THE WESTERN TOOL & MANUFACTURING COMPANY

Dated November 1, 1923.

THIS AGREEMENT, made and entered into as of the 1st day of November, 1923, by and between Charles S. Deneen, W. T. Kettering, Edward I. Bloom, and E. J. Price, all of Chicago, Illinois, and W. D. Hollister, of the City of Delavan, State of Wisconsin, and their and each of their successors (sometimes hereinafter called the "Committee," which shall include whomsoever may compose the Committee from time to time), parties of the first part, Central Trust Company of Illinois, of Chicago, Illinois (hereinafter called the "Depositary"), party of the second part, the several holders of the outstanding First Mortgage Serial Eight Per Cent Gold Bonds, dated November 1, 1921, issued by the Western Tool & Manufacturing Company (hereinafter called the "Company"), a corporation organized and existing under the laws of the State of Ohio, who shall execute this agreement, or who shall deposit their bonds hereunder (hereinafter called the "Depositors"), parties of the third part.

• • • • • • • • • • •

The Depositors who unite in this Agreement by depositing their respective bonds and coupons as aforesaid, hereby severally and respectively assign and transfer to the Committee, the said bonds and coupons so deposited for the purpose of enabling the Committee to carry out this Agreement.

* * * * * * * * * *

Upon the deposit of any bonds with the coupons thereto belonging and upon the issuance of a certificate therefor by the Depositary, the Committee shall be considered to be the owner thereof, in law and in equity, and of all right, title and interest of the original depositor therein, and neither the Committee nor the Depositary shall be affected by any notice to the contrary.

* * * * * * * * * *

FOURTH.

Powers of the Committee.

The Committee is hereby expressly authorized and empowered to exercise, in its discretion, all such rights and powers, and to take all such measures and to do all such acts as the Committee may deem necessary or proper in the interest of and to protect the Depositors and to promote and carry out the purposes of this Agreement, although any such rights, powers, measures or acts may not be expressly conferred or authorized by the terms hereof, as fully and effectually as if the same were herein distinctly specified; and as often as and for any cause or reason that it may deem expedient, to protect the interests of the depositors hereunder. The methods to be adopted in carrying out this Agreement are to be solely within the discretion of the Committee.

The Committee shall be, and hereby is, vested, under and by virtue of this Agreement, as the Trustee of an express trust, with legal title to all of the bonds and coupons which may be deposited hereunder, and with all rights of action on or with respect thereto or on or with respect to any guaranty or other collateral undertaking in relation to such bonds and coupons; and the depositors hereby severally and respectively assign and transfer the same to the Committee. The Committee is also hereby vested

with full and absolute power and authority, in its own name or otherwise, to take, or cause to be taken, such steps, proceedings and actions, and to exercise such rights and privileges, as owner or holder of the deposited bonds and coupons, or otherwise, as it may, from time to time, in its sole discretion, deem proper, necessary or advisable, for the purpose of consummating this Agreement, or for the purpose of protecting, preserving, securing or enforcing the rights and interests of the holders of the bonds and coupons deposited hereunder, severally and collectively; and, to that end and for that purpose, the Committee is hereby authorized and empowered, as it, in its sole discretion, may deem expedient, necessary or proper, to institute, maintain and prosecute all suits and proceedings at law and in equity, and to discontinue, dismiss, control and compromise any and all suits and proceedings, at law or in equity, no matter by whom the same may be instituted.

Without limiting or modifying in anywise, the rights, powers and authority vested in the Committee, in and by this Agreement, it is hereby expressly declared and agreed that the Committee shall be and hereby is absolutely and irrevocably authorized and empowered to do, or cause to be done, the following things, or any one, or more of them, as and when, and in such way and manner as the Committee in its sole discretion may deem proper, necessary or advisable, to-wit:

• • • • • • • • • • •

(6) To waive or enforce any default under the provision of said trust indenture; to consent to any modification of the provisions of said trust indenture; to consent to the release or sale of any property subject thereto and the application of the proceeds thereof.

• • • • • • • • • • •

(13) To enter into and carry out such agreements as the Committee in its discretion may deem advisable in respect of the bonds, the floating and other indebtedness of the Company, and the payment, refunding, conversion or adjustment thereof.

• • • • • • • • • • •

(18) The said Committee is hereby given full power to arrange for the refunding of said bond issue at a lower rate of interest, not less than six and one-half (6½) per

cent per annum, and with maturities not later than those suggested in the following schedule:

$ 5,000	November 1, 1925
5,000	" 1, 1926
5,000	" 1, 1927
5,000	" 1, 1928
5,000	" 1, 1929
10,000	" 1, 1930
10,000	" 1, 1931
10,000	" 1, 1932
10,000	" 1, 1933
10,000	" 1, 1934
25,000	" 1, 1935

such refunding issue of bonds to be in similar denominations to the present, dated May 1, 1923, and to be secured by a Trust Indenture to such Trustee, as the Committee may arrange for, and having such terms and provisions as the Committee may prescribe for the security and enforcement of said bond issue.

(a) Such refunding bonds, if issued, shall be exchanged for the present bonds which may be deposited under this Agreement in such a manner that the maturities of the new bonds held by each bondholders will have the same relation to the whole issue as the bonds held at present by such bondholder, but the Committee's decision in making such exchange shall be final and binding on all parties.

(b) In making a refunding issue of bonds the Company may exclude such of the real estate as is not needed by the Company, in the judgment of the Committee, provided that in case of sale the proceeds of such excluded real estate shall be applied as the Committee may decide.

(c) Also if said Committee approves, the provisions in the present Trust Indenture for the carrying of Life Insurance for the benefit of the bondholders may be entirely eliminated, provided that the cash surrender value received on cancelling the present insurance shall be applied on principal or interest of said bond issue when received.

• • • • • • • • • •

EIGHTH.

The Committee and the Depositary May Be Interested in the Property and in Contracts Concerning the Same.

Any member of the Committee, or any firm or corporation of which he may be a member, director or officer, and the Depositary, and its directors, officers and agents, may be or become pecuniarily interested in any securities, property, matters or things which are or may become the subject of this Agreement, or be issued hereunder, or in any syndicate or contract with the Committee which may be effected or entered into for the purpose of carrying out this Agreement.

• • •

PETITIONER'S EXHIBIT 19.

WESTERN TOOL AND MANUFACTURING COMPANY
W. T. Kettering, Receiver

BALANCE SHEET
as at December 31st, 1942

ASSETS

Current Assets		
Cash in Banks	$ 25,654.36	
Accounts Receivable, Customers	11,249.32	
Inventories		
Raw Material	21,072.81	
Finished Goods and Work in Process	12,396.53	
Total Current Assets		$ 70,373.02
Fixed Assets		
Land	$ 5,000.00	
Buildings	29,476.86	
Machinery	10,527.71	
Dies	583.74	

Jigs and Fixtures	482.96	
Belting and Pulleys	664.48	
Patterns	992.02	
Office Fixtures	283.56	
Total Fixed Assets	$ 48,011.33	
Less: Reserves for Depreciation	2,032.08	
Net Fixed Assets		45,979.25
Other Assets		
U. S. Tax Savings Notes (plus accrued interest)	$ 20,128.00	
Treasury Stock (2 Shares Western Tool & Manufacturing Co.)	200.00	
Total Other Assets		20,328.00
Deferred Charges		3,934.85
Total Assets		$140,615.12

WESTERN TOOL AND MANUFACTURING COMPANY
W. T. Kettering, Receiver

BALANCE SHEET
as at December 31st, 1942

LIABILITIES AND CAPITAL

Current Liabilities		
Accounts Payable		$ 1,275.94
Liability to Bondholders Trustee		
(Judgment dated December 8th, 1942)		128,055.19
Reserve for Federal Income and Excess Profits tax, for year 1942		62,892.07
Capital and Surplus		
Capital Stock		
Common Stock		
Authorized 1500 shares, par value $100.00 per share.	$150,000.00	
Less: Unissued 379½ shares	37,950.00	
Issued and outstanding	$112,050.00	

Preferred Stock		
Authorized 500 shares par value $100.00 per share	$ 50,000.00	
Less: Unissued, 500 shares	50,000.00	
Issued and outstanding		
Surplus—*Deficit*	163,658.08	
Total Capital & Surplus—*Deficit*		51,608.08
Total Liabilities and Capital		$140,615.12

PETITIONER'S EXHIBIT 20.

WESTERN TOOL AND MANUFACTURING COMPANY
W. T. Kettering, Receiver

STATEMENT OF PROFIT AND LOSS
For Year Ended December 31, 1942

		Amount	*% to Sales*
Sales	$	$195,466.78	100.00
Cost of Sales			
Inventory January 1st, 1942	13,960.53		
Purchases	21,756.97		
Wages	67,935.21		
	103,652.71		
Less: Inventory December 31st, 1942, Raw material, Finished Goods, Work in Process	33,469.34		
Cost of Sales		70,183.37	35.91
Gross Profit		125,283.41	64.09

Manufacturing Expenses			
Shop Supplies	$ 9,956.40		
Fuel and Power	2,463.50		
Repairs to Buildings—Equipment	5,597.75		
Machinery Rental	491.30		
Insurance	1,171.25		
Social Security Tax	1,718.43		
Freight	991.79		
Taxes, Real Estate & Personal Property	563.53		
Depreciation Buildings and Machinery	2,009.02		
Total Manufacturing Expenses	$ 24,962.97		12.77
Selling, General and Administrative Expense			
Salaries	$ 2,115.00		
Receivers Fee	2,880.00		
Legal Fees, including Trustee fee	4,400.93		
Advertising	661.00		
Sales Commissions	1,234.83		
Traveling Expense	223.75		
Telephone—Telegraph	191.48		
Postage and Shipping	510.17		
Taxes, Federal & State Capital Stock	650.00		
Taxes, 1941 Federal Income & Excess Profits	1,594.10		
Accounting & Directors Fees	305.00		
Watch Service	455.80		
Employees Merit Award & Bonuses	410.00		
General, Miscellaneous Expenses	485.32		
Depreciation, Office Fixtures	23.06		
Printing, Stationery & Office Supplies	250.50		
Total Selling, Gen. & Admn. Expense	$ 16,390.94		8.39
Total Mfg., Selling, Gen. & Admn. Exp.		41,353.91	21.16
Profit from Operations (forward)		$ 83,929.50	42.93

(Page 2)

WESTERN TOOL AND MANUFACTURING COMPANY
W. T. Kettering, Receiver

STATEMENT OF PROFIT AND LOSS
For Year Ended December 31, 1942

	Amount		% to Sales
Profits from Operations (brought forward)		$ 83,929.50	42.93
Other Income			
Rents received	2,087.50		
Commission on candy machine	24.57		
Bank Interest	161.96		
Premium on Sale of Liberty Bond	52.51		
Total Other Income		2,326.54	1.19
		86,256.04	44.12
Other Expense			
Interest on company bonded indebtedness January 1 to December 8, 1942	$ 5,479.49		
Interest on judgment liability December 8th to December 31, 1942	666.98		
Interest and Discount, Net	1,494.48		
Total Other Expense		7,640.95	3.91
Net Profit for year ended December 31st, 1942 (before provision for Federal income and excess profits tax for year 1942)		$ 78,615.09	40.21
Deduct: Federal income and excess profits tax for year 1942 (estimated)		62,892.07	32.17
Net Profit after Federal income and excess profits tax		$ 15,723.02	8.04

PETITIONER'S EXHIBIT 21.

COURT OF COMMON PLEAS,
CLARK COUNTY, OHIO.

Owen N. Price, as Trustee, *Plaintiff*,
vs.
The Western Tool & Manufacturing Company, *Defendant*.
No. 36421

INVENTORY AND APPRAISEMENT

of Assets and Property of

THE WESTERN TOOL & MANUFACTURING COMPANY,

as of July 15, 1942.

RECAPITULATION

	Appraised Value
Total—Machinery, Equipment, etc. (p. 7)	$15,402.72
Total—Materials (p. 17)	28,792.63
Total—Real Estate (p. 18)	37,585.00
Total Appraisement	$81,780.35

ORDER.

(Filed July 17, 1943)

This day this cause came on to be heard on the motion heretofore, to-wit, on February 5, 1943, filed by and on behalf of the Bondholders' Protective Committee, to dismiss the petition herein.

Upon consideration whereof and after hearing the arguments of counsel and being fully advised in the premises, the court finds that said motion is well taken and that it should be sustained.

IT IS, THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED that the motion above referred to be, and hereby the same is, sustained;

IT IS FURTHER BY THE COURT ORDERED, ADJUDGED AND DECREED that the petition filed in this cause on January 11, 1943, and these proceedings be, and hereby the same are, dismissed at the costs of James G. Gurney and his associates.

To all of which findings, rulings, orders, judgments and decrees of the court, James G. Gurney and his associates, by their counsel, all and each, jointly and severally, except.

NEVIN
United States District Judge.

DECISION.

(Filed July 17, 1943)

NEVIN, *District Judge*:

On January 11, 1943, a petition was filed in this Court entitled In the Matter of The Western Tool & Manufacturing Company, a corporation, Debtor.

The following allegations appear at the outset of the petition, to-wit: "Your petitioner, The Western Tool & Manufacturing Co., respectfully represents:

1. Petitioner is a corporation organized and existing under the laws of the State of Ohio and is a corporation which could become a bankrupt under the Acts of Congress relating to bankruptcy and is not a municipal, insurance or banking corporation or a building and loan association or a railroad corporation.

2. Your petitioner now has and for the last six months preceding the filing of this petition has had its principal office and place of business at Springfield, Ohio, within the territorial jurisdiction of this Court.

3. The nature of the business of the petitioner is the ownership and operation of a factory for the manufacture of tools, which factory is located in Springfield, Ohio.

4. Petitioner was incorporated in the year 1904 under the name of the Western Manufacturing Company, which name was subsequently changed to The Western Tool & Manufacturing Co."

Immediately after the foregoing averments further allegations are set forth, among others the following:

"13. Adequate relief cannot be obtained under the provisions of Chapter XI of the Acts of Congress relating to Bankruptcy for the reasons, among others, that the principal indebtedness of petitioner is secured as aforesaid.

14. Petitioner desires that a plan of reorganization be effected for it under and pursuant to Chapter X of said Act.

15. No other petition by or against petitioner is pending under Chapter X of this Act, nor is any other bankruptcy proceeding by or against petitioner now pending."

Thereafter, the petition states that:

"WHEREFORE petitioner prays:

A. That an order be entered approving this petition.

B. That further proceedings may be had upon this petition in accordance with the provisions of Chapter X of said Act and your petitioner may have such other and further relief as is necessary."

To the petition, there is attached an affidavit of James G. Gurney. It is recited in the affidavit that James G. Gurney "is the owner of seven (7) shares of the One Hundred ($100.00) Dollar par value common stock of The Western Tool & Manufacturing Co., and that he is the agent and attorney-in-fact and holds the proxy of Harlan T. Hyde, James Gurney (also known as James Gurney, Jr.) and Stella K. Gurney and as such agent and attorney-in-fact has full power and authority to do all things which

the aforesaid principals might or could do in the protection and advancement of their interest as shareholders of said corporation," and "that Stella K. Gurney is the owner and holder of sixty-six like shares of said corporation; that James Gurney (also known as James Gurney, Jr.,) is the owner and holder of fifty-nine (59) like shares of said corporation and that Harlan T. Hyde is the owner and holder of five hundred fifty and three-fourths (550¾) like shares of said corporation; that the duly issued and outstanding shares of said corporation are one thousand one hundred twenty and one-half (1120½) common shares."

There is also attached to the petition, a document marked "Exhibit A" entitled "Voting Trust Agreement, The Western Tool & Manufacturing Co."

The petition is signed "The Western Tool and Manufacturing Co., by James G. Gurney."

On January 12, 1943, Mr. George R. Murray, a member of the bar of this Court, appeared before the court and stated (as appears of record in the transcript filed in this case) that along with counsel located in Chicago, Illinois, he represented Mr. James G. Gurney and his associates. Mr. Murray further stated that he had filed the petition above referred to for the reorganization of The Western Tool & Manufacturing Company, under Chapter 10, of the Bankruptcy Act. As the record shows, an *ex parte* hearing was held on January 12, 1943.

While it appears on the face of the petition that the petitioner is The Western Tool & Manufacturing Company, it developed from Mr. Murray's statements that the corporation as such had taken no action authorizing the filing of the petition. That it had in fact previously ignored a demand made by Mr. Gurney and his associate stockholders that the corporation "forthwith file a petition under and pursuant to the provisions of Chapter 10, of the Act of Congress relating to Bankruptcy, for the relief of your corporation and for a stay of the pending proceedings against you in the Court of Common Pleas of Clark County, Ohio, designated as Owen N. Price, Plaintiff, *vs.* The Western Tool & Manufacturing Company, a corporation, Defendant, and designated as No. 36421."

In signing the petition, Mr. Gurney recites no official capacity with the corporation. He claims only to act for himself and associate stockholders, whom it is asserted (Rec. P. 9, and affidavit of Mr. Gurney) own a majority of the stock.

As appears of record, the court, at the *ex parte* hearing on January 12, 1943, questioned counsel as to the right of Mr. Gurney to file the petition herein. Mr. Murray responded that under the circumstances claimed here to exist, it was not necessary that the corporation as such, take any action preliminarily to the filing of the petition because (Rec. Pp. 9-12) "we are appealing to the equitable side of this court at this time."

At the conclusion of the *ex parte* hearing, and based upon the statements of counsel then made (Rec. Pp. 31-32) the court permitted the petition to remain on file with the understanding (as shown by the record) that any proper party might, if it was so desired, later raise the question as to the right of James G. Gurney and his associates to file the petition under the Bankruptcy Act in the first instance; whether or not the petition was filed in good faith, or any other pertinent questions.

At the conclusion of the *ex parte* hearing on January 12, 1943, an Order was entered, approving the petition as filed in good faith; enjoining certain named parties from further proceedings and continuing the cause for further hearing until February 19, 1943.

On February 19, 1943, (as appears of record) a further hearing was held, at which counsel representing various interested parties and also counsel for James G. Gurney and his associates appeared. At this hearing, counsel for the parties other than James G. Gurney and his associates, challenged the right of James G. Gurney to file the petition in the first instance, and raised the question of good faith, as well as presenting other issues.

In the meantime, to-wit on February 5, 1943, a document had been filed entitled "Motion of the Bondholders' Protective Committee" which reads in part as follows: "Now come Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering and say they are a duly constituted Committee under a Bondholders' Protective Agreement of November 1, 1923, * * * and as such Committee now

move "the Court to dismiss the Petition herein for the following reasons, to wit:

First: The Petition herein was filed without the authority of said The Western Tool & Manufacturing Co. or its Board of Directors and without the knowledge, assent or authority of any of its officers or any of its directors other than James G. Gurney.

Second: It is unreasonable to expect that a plan of reorganization of said corporation can be effected; in fact it is plainly impossible to effect a reorganization since there are no unsecured creditors and, apart from taxes to the State of Ohio and to the United States, there is but one class of creditors, all of the valid and outstanding bonds secured thereby, $73,100.00 in amount, being held by one secured creditor, to-wit: this Bondholders' Protective Committee.

Third: The petition herein was not filed in good faith, but was filed by said James G. Gurney, the owner of only three shares of stock, without authority or legal right in pursuance of his attempt to dictate the policy and management of said corporation for his own personal advantage and to delay or defeat the corporation's effort to pay its bonded indebtedness."

On the same day, to-wit, February 5, 1943, a document was filed entitled "Motion of Owen N. Price, Trustee for Bondholders." In his motion, Owen N. Price says among other things "that he is the duly constituted Trustee for bondholders under the Mortgage Deed of Trust, dated November 1, 1921, executed by said The Western Tool & Manufacturing Company," and he moves the court to dismiss the petition upon the same grounds and for the same reasons as set forth in the motion of the Bondholders' Protective Committee.

While the court stated (record pages 32, 40-42) that the purpose and effect of the Order entered on January 12, 1943, at the conclusion of the *ex parte* hearing was to keep all matters and proceedings in their then status until there was "an opportunity for everybody to be heard at the proper time" and at the hearing on February 19, 1943, "that all the questions should be heard that are necessary, just as if you were here initially," nevertheless, the court has concluded to consider and dispose of

the matters before it as upon the motion above referred to, of the Bondholders' Protective Committee—the motion of Owen N. Price, as indicated, being to the same effect.

Briefs have been filed on behalf of the respective parties. It is stated by counsel for James G. Gurney and his associates (R. Br. P. 2) that "the theory of the petition in this cause is that these shareholders may appear in the right of the corporation," and that they are, as heretofore stated, "appealing to the equitable side of this court." (Rec. P. 12) They further submit (R. Br. P. 1) that "the right of shareholders to act on behalf of the corporation, under such circumstances, (as here) is established by the case * * * of *Hawes* v. *Oakland*, 104 U. S. 450."

In view of the statements and observations made by the court (as appear of record) at both of the hearings, the court deems it unnecessary to here go into further detail.

Upon a consideration of the facts as disclosed by the record in the instant case, the court is of opinion that James G. Gurney and his associates do not bring themselves within the rule laid down in the *Hawes* case, *supra*.

Upon a consideration of the whole of the record, the briefs and arguments of counsel, and the applicable law, the court is of opinion and so finds that the motion hereinbefore referred to of the Bondholders' Protective Committee is well taken and that it should be, and it is, sustained. *Bryan* v. *Welch*, 74 F. (2d) 964, (C.C.A. 10); *In re*: *Piccadilly Realty Co.*, 78 F. (2d) 257, (C.C.A. 7); *In re*: *Pittsburgh Terminal Coal Corp.*, 30 F. Supp. 106, (affirmed 109 F. (2d) 1020, C.C.A.3.)

The Court has prepared and filed an order in accordance with its findings and ruling herein.

In accordance with a suggestion theretofore made (Rec. P. 40) a motion was filed on March 15, 1943, by and on behalf of James G. Gurney and his associates in which the Court is asked "to strike out of the affidavit of Enoch J. Price, heretofore filed herein, the Fifth paragraph on pages one and two, the Sixth paragraph on page two, the Seventh paragraph on page two, the Ninth paragraph on page three and all of the remaining paragraphs contained in said affidavit and also that portion of Exhibit C en-

titled 'Complaint in Equity' without striking out Exhibit A attached thereto and designated 'Voting Trust Agreement'."

The Court has heretofore entered an order sustaining the motion just referred to of James G. Gurney and his associates and in arriving at its decision and conclusion on the Motion of the Bondholders' Protective Committee, has not considered those portions of the affidavit of Enoch J. Price which were ordered stricken out.

NEVIN J.

Appearances:

George R. Murray, Esq., Dayton, Ohio.
Charles W. Stiefel, Jr., Esq., Chicago, Ill.,
Attorneys for James G. Gurney, Petitioner.

William H. Griffith, Esq., Springfield, Ohio.
Attorney for The Western Tool and Manufacturing Company.

William W. Keifer, Esq., and
Horace S. Keifer, Esq., of
Keifer & Keifer, Springfield, Ohio,
Attorneys for Owen N. Price, Trustee for Mortgage Bondholders and Bondholders' Protective Committee, The Western Tool and Manufacturing Company.

ENTRY OF ORDER DISSOLVING INJUNCTION.

(Filed August 11, 1943)

It appearing that an Order of Injunction was made and entered in this matter on January 12, 1943, against various parties by name and by groups, and that pursuant to the order of this Court of July 17, 1943, dismiss-

ing the Petition herein said injunction should be dissolved, if such has not already been the result of the order of said dismissal, it is now by the Court expressly ordered that said injunction heretofore granted on January 12, 1943, restraining Owen N. Price, as Trustee, and others from certain actions in connection with The Western Tool & Manufacturing Company be and the same is dissolved. To which order of the Court James G. Gurney and others on whose behalf the Petition herein was filed by their counsel except.

NEVIN
U. S. District Judge.

Approved:
KEIFER & KEIFER
Attys. for Owen N. Price
Trustee and others

See Letters from Keifer & Keifer dated Aug. 10 & Aug. 7 and Letter from Judge Nevin to Keifer & Keifer dated Aug. 9th, 1943 *re* signature of counsel for James G. Gurney, *et al.* on this entry.

NOTICE OF APPEAL.

(Filed August 11, 1943)

Notice is hereby given that the Western Tool & Manufacturing Company, a corporation, and Harlan T. Hyde, James Gurney, also known as James Gurney, Jr., Stella Gurney and James G. Gurney, individually and being the owners of more than the majority of the outstanding shares of The Western Tool & Manufacturing Company, debtor above named, hereby appeal to the Circuit Court of Appeals for the 6th Circuit from the order dismissing the petition and the final judgment entered in this action on the 17th day of July, 1943 and from the order dis-

solving the injunction entered in this action on the 11th day of August, 1943.

CHAS. W. STIEFEL JR.
30 North LaSalle Street
Chicago, Illinois

GEO. R. MURRAY
1103-1106 Callahan Building
Dayton, Ohio

Attorneys for the Appellants, The Western Tool & Manufacturing Company and Harlan T. Hyde, James Gurney, also known as James Gurney, Jr., Stella Gurney and James G. Gurney.

ORDER.

(Filed August 11, 1943)

The time within which the record on appeal must be filed is hereby extended to seventy-five days from the date of the filing of the notice of appeal herein.

Approved:

NEVIN
Judge

Consented to by W. W. Keifer, Atty
by telephone Aug. 11, 1943
GEO. R. MURRAY

CHAS. W. STIEFEL
GEO. R. MURRAY
Attys for Appellants.

BOND ON WRIT OF ERROR OR APPEAL.

(Filed August 11, 1943)

Bond No. 93935

KNOW ALL MEN BY THESE PRESENTS

That we, James G. Gurney, as principal and The Western Casualty and Surety Company, a Kansas Corporation as sureties, are held and firmly bound unto Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering as a committee under a Bondholders Protective Agreement of Nov. 1, 1923 and Owen N. Price as Trustee for Bondholders under Mortgage Deed of Trust dated Nov. 1, 1921 in the full and just sum of Two Hundred Fifty Dollars, to be paid to the said Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering as a committee under a Bondholders Protective Agreement of Nov. 1, 1923 and Owen N. Price as Trustee for Bondholders under Mortgage Deed of Trust dated Nov. 1, 1921 certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this ninth day of August in the year of our Lord one thousand nine hundred and forty-three.

WHEREAS, lately at a regular term of the District Court of the United States for the Southern District of Ohio, Western Division, in a proceedings depending in said Court for the re-organization under Chapter X of the Bankruptcy Act, of The Western Tool and Manufacturing Co. which proceeding was instituted by James G. Gurney, individually and on behalf of other shareholders in behalf of said corporation an order was entered against the said Petitioner dismissing said Petition and Proceeding on July 17, 1943, and the said Petitioner, The Western Tool and Manufacturing Co. having filed its Notice of Appeal in the Clerk's Office of the said Court to reverse the said order in the aforesaid suit, and citing and admonishing Appellees to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the fifth day of October, 1943 next.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that, if the said James G. Gurney on behalf of The Western Tool and Manufacturing Co. shall prosecute his appeal to effect, and answer all damages and cost if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

.....

JAMES G. GURNEY,
Individually and on Behalf of
The Western Tool and Manufacturing Co.

The Western Casualty and Surety Company
By: PETER S. PEDERSEN,
Peter S. Pedersen,
Attorney-in-Fact.

Approved by:

NEVIN,
United States District Judge,
Southern District of Ohio.

POWER OF ATTORNEY

THE WESTERN CASUALTY AND SURETY COMPANY
Home Office—Fort Scott, Kansas

KNOW ALL MEN BY THESE PRESENTS: that The Western Casualty and Surety Company, of Fort Scott, Kansas, a corporation of the State of Kansas, having its principal office in the city of Fort Scott, Kansas, pursuant to the following By-Law, which was adopted by the Board of Directors of the said Company on March 22nd, 1929, to-wit:

"Article IV, Section 5.—The President, or the Secretary-Treasurer, shall have power and authority to appoint resident Vice-Presidents, resident Assistant Secretaries, and Attorneys-in-fact and to authorize them to execute on behalf of the Company and attach the seal of the Company thereto, bonds, and undertakings, recognizances, contracts

of indemnity and other writings obligatory to the nature thereof''
does hereby nominate, constitute and appoint Peter S. Pedersen, of the City of Chicago, State of Illinois, its true and lawful agent(s)-in-fact, and attorney(s)-in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed: Any and all bonds and undertakings.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Fort Scott, State of Kansas, in their own proper persons.

All authority hereby conferred shall expire and terminate without notice one year from date of issue.

In Witness Whereof, Ray B. Duboc, President has hereunto subscribed his name and affixed the corporate seal of the said The Western Casualty and Surety Company, of Fort Scott, Kansas, this 12th day of June, 1943.

The Western Casualty and Surety Company

(Seal) By Ray B. Duboc,
President.

State of Kansas }
County of Bourbon } ss.

On this 12th day of June, A. D., 1943, before the subscriber, a Notary Public of the State of Kansas in and for the County of Bourbon, duly commissioned and qualified, came Ray B. Duboc, President of The Western Casualty and Surety Company, of Fort Scott, Kansas, to me personally known to be the individual and officer described in, and who executed the preceding instrument, and he acknowledged the execution of the same, and, being by me duly sworn, deposeth and saith, that he is the officer of the Company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said Company, and the said corporate seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Company, and that By-Law, Article IV, Section 5, adopted by the Board

of Directors of said Company, referred to in the preceding instrument, is now in force.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at the City of Fort Scott, the day and year first above written.

(Seal)

My Commission expires July 21st, 1945.

E. A. SHAVER,
Notary Public.

I, F. W. Duboc, Assistant Secretary of The Western Casualty and Surety Company, do hereby certify that the above and foregoing is a true and correct copy of the original Power of Attorney given by said Company to Peter S. Pedersen, of Chicago, Illinois, authorizing him to execute bonds as therein set forth, and do hereby further certify that the said Power of Attorney has been in full force and effect since the date thereof and is in full force and effect on the date of this certificate.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of said Company at Fort Scott, Kansas, this 9th day of August, 1943.

F. W. DUBOC,
Assistant Secretary.

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

(Filed Sept. 3, 1943)

And now comes the Western Tool & Manufacturing Company, a corporation, and James G. Gurney, individually and on behalf of other shareholders of said corporation, in behalf of said corporation, petitioners-appellants, and designates the following portions of the record, proceedings and the evidence to be contained in the record on appeal, viz:

1. Petition of Western Tool & Manufacturing Company for reorganization, filed January 11, 1943, together with affidavit of James G. Gurney attached thereto and exhibit attached thereto.

2. Injunctional order entered January 12, 1943.

3. Motion of the Bondholders' Protective Committee filed February 5, 1943, to dismiss the petition.

4. Condensed Statement in Narrative Form filed herewith, of testimony of witnesses heard in hearing held February 19, 1943, before the honorable Robert R. Nevin.

5. Exhibits made a part of the transcript of testimony and included and attached to the Condensed Statement in Narrative Form, of testimony, filed herewith.

6. The following exhibits in their respective original form:

Petitioners' Exhibits 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 (excluding balance sheets), 15, 16, 17, 19, 20.

7. The following excerpts from the following Exhibits:

A. From petitioners' Exhibit 1:

(a) The heading.

(b) Paragraphs 1 and 2 on page 1 thereof.

(c) Paragraphs 7 and 8 on page 7 thereof.

(d) Paragraphs 12 and 13 on page 9 thereof.

(e) The words "Wherefore, the Plaintiff prays" and paragraph 16 (e) on page 10 thereof.

(f) Paragraph 16 (e) on page 11 thereof.

B. From petitioners' Exhibit 4:

(a) The heading.

(b) Page 2 thereof.

(c) All but the last paragraph of page 3 thereof.

C. From petitioners' Exhibit 18:

(a) The heading and first paragraph on page 1 thereof.

(b) The heading "Fourth—Powers of Committee" and the last paragraph, all appearing on page 7 thereof.

(c) All of page 8 thereof.

(d) The first eleven lines on page 9 thereof.

(e) Paragraph (6) on page 10 thereof.

(f) Paragraph (13) on page 12 thereof.

(g) Paragraph (18), (18) (a), (b) and (c) appearing on pages 13 and 14 thereof.

(h) Paragraph Eighth appearing on page 16 thereof.

D. From petitioners' Exhibit 21:

(a) The title page, being the first page thereof and unnumbered.

(b) The heading "Recapitulation" and the four items appearing under such recapitulation, together with the values of each, all appearing on page 19 thereof.

8. Order entered by Judge Robert R. Nevin July 17, 1943 dismissing the petition and proceedings.

9. Decision of Judge Robert R. Nevin filed July 17, 1943 in connection with such order dismissing proceedings.

10. Order of Judge Robert R. Nevin entered August 11, 1943 dissolving injunction (excluding correspondence attached thereto).

11. Notice of appeal filed August 11, 1943.

12. Order of Judge Robert R. Nevin entered August 11, 1943 extending time to file record on appeal.

13. Bond for costs.

14. Designation of contents of record.

15. Statement of points relied on.

16. Clerk's certificate to the record.

Dated: August 30, 1943.

George R. Murray
GEORGE R. MURRAY
Callahan Building,
Dayton, Ohio.

Chas. W. Stiefel, Jr.
CHAS. W. STIEFEL, JR.
30 N. LaSalle St.
Chicago, Illinois.
Attorneys for Appellants.

STATEMENT OF APPELLANTS' POINTS ON APPEAL.

(Filed Sept. 3, 1943)

Now come the petitioners-appellants and state that they rely upon the following points in the prosecution of their appeal from the final orders and judgment entered on July 17, 1943 and the final order entered August 11, 1943:

1. The District Court erred in sustaining the motion filed February 5, 1943 by and on behalf of the Bondholders' Protective Committee to dismiss the petition.

2. The District Court erred in dismissing the petition and the proceedings for reorganization.

3. The District Court erred in failing to deny the petition of the Bondholders' Protective Committee to dismiss the petition.

4. The District Court erred in entering the order of August 11, 1943 dissolving the injunction entered January 12, 1943.

5. The District Court erred in dismissing the petition filed January 11, 1943 and the proceedings at the costs of James G. Gurney and his associates.

6. The District Court erred in not finding that the petition filed January 11, 1943 was properly filed under Chapter X of the Bankruptcy Act.

7. The District Court erred in not finding that the petition filed January 11, 1943 was filed in good faith.

8. The District Court erred in not approving the petition filed January 11, 1943 as having been filed in good faith.

WHEREFORE petitioners-appellants pray that the said final orders and judgments in this cause may be reversed and for such other and further relief as may be just in the premises.

George R. Murray
GEORGE R. MURRAY
Callahan Building,
Dayton, Ohio.

Chas W. Stiefel, Jr.
CHAS. W. STIEFEL, JR.
30 N. LaSalle St.
Chicago, Illinois.

Attorneys for Appellants.

DESIGNATION OF APPELLEES OF PORTIONS OF RECORD FOR RECORD ON APPEAL.

(Filed Sept. 14, 1943)

Now come the Appellees, Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering, the Bondholders' Protective Committee for holders of bonds of The Western Tool & Manufacturing Company, and Owen N. Price, Trustee for bondholders of The Western Tool & Manufacturing Company, and object to and protest against the Designation filed in the name of The Western Tool & Manufacturing Company for the reason that said Company did not file or authorize the same, nor does James G. Gurney nor any other shareholder of said corporation, nor the attorneys for said James G. Gurney represent or are they authorized to appear for said Company; said Appellees likewise object to the mention in paragraph 1 of said Appellant's Designation of "Petition of Western Tool & Manufacturing Company for reorganization filed January 11, 1943" for the reason that no such Petition was filed by or for said The Western Tool & Manufacturing Company.

Said Appellees designate the following portions of the record, proceedings and evidence to be contained in the Record of Appeal:

1. Application of The Western Tool & Manufacturing Company filed herein February 5, 1943.
2. From Petitioner's Exhibit 1, (Petition for Foreclosure in Common Pleas Court):
   (a) Paragraph 3 (page 2) except the description of the property.
   (b) Paragraph 5(f).
   (c) Paragraph 5(h).
   (d) Paragraph 11.
   (e) Paragraph 14.
3. From Petitioner's Exhibit 4 (Judgment Entry in Foreclosure case in Common Pleas Court), all of page 1.

4. From Petitioner's Exhibit 18, (Bondholders' Protective Agreement):

   (a) The second paragraph beginning on page 3 (beginning "The depositors who unite", etc.) down to and including the word "Agreement" in line 6 of said paragraph.

   (b) The last sentence on page 5 (beginning with the words "Upon the deposit of any bonds", etc.).

September 13, 1943.

Keifer & Keifer
KEIFER & KEIFER
512 M & M Building,
Springfield, Ohio.
Attorneys for Appellees.

Receipt of copies of above designation is hereby acknowledged this 14th day of September, 1943.

CHAS. W. STIEFEL
GEO. R. MURRAY
Attorneys for Appellants.

CLERK'S CERTIFICATE.

I, Harry F. Rabe, Clerk of the District Court of the United States for the Southern District of Ohio, Western Division, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Designation of Portions of Record filed by Appellants and Designation of Portions of Record filed by Appellees in this Court in the cause entitled "In the Matter of The Western Tool & Manufacturing Company, No. 9061" as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at my office in the City of Dayton in said District this ..... day of October, A. D. 1943.

.....

HARRY F. RABE,
Clerk.

(Seal)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE WESTERN TOOL & MANUFACTURING COMPANY TO DISMISS APPEAL

(Filed November 3, 1943).

Now comes The Western Tool & Manufacturing Company and moves the Court dismiss the appeal in this proceeding for the following reasons:

1. There was no authority given by this Company to the attorneys for James G. Gurney or to any other person to give any notice of appeal of the proceeding sought to be appealed herein, nor have said attorneys now any authority to appear for said Company.

2. The parties attempting to appeal herein have no appealable interest in the proceedings sought to be appealed here.

This Motion is supported by affidavits attached hereto and filed herewith.

The Western Tool & Manufacturing Company,

By Enoch J. Price,
Its President

Erna H. Wheeler,
Its Secretary.

Wm. H. Griffith,
Springfield, Ohio.

State of Illinois, County of Cook, ss.

Enoch J. Price, being first duly sworn, says that he is the President of The Western Tool & Manufacturing Company, the corporation mentioned in the above proceeding, and is familiar with its business and affairs; and that no authority has been given by said Company, its Directors or officers to Charles W. Stiefel, Jr., or George

R. Murray to give any notice of appeal or perfect an appeal for it, or appear for said Company in the above entitled proceeding.

Enoch J. Price,

Sworn to and subscribed before me this 29th day of October, 1943.

Ruth C. Nettland,
Notary Public.

State of Ohio, County of Clark, ss.

Erna H. Wheeler, being first duly sworn, says that she is the Secretary, Treasurer, Manager and a Director of said The Western Tool & Manufacturing Company of Springfield, Ohio, a corporation, and she is familiar with its business and affairs; and that no authority has been given by said Company, its Directors or officers to Charles W. Stiefel, Jr., or George R. Murray to give any notice of appeal or perfect an appeal for it, or appear for said Company in the above entitled proceeding.

Erna H. Wheeler,

Sworn to and subscribed before me this 1st day of November, 1943.

Eva M. Hauck,
Notary Public.

MOTION OF OWEN N. PRICE, TRUSTEE FOR BONDHOLDERS OF THE WESTERN TOOL & MANUFACTURING COMPANY AND BONDHOLDERS' PROTECTIVE COMMITTEE TO DISMISS APPEAL.

(Filed November 3, 1943.)

Now come Owen N. Price, Trustee for bondholders of The Western Tool & Manufacturing Company under a

Mortgage Deed of Trust executed by said Company of November 1, 1921, and Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering, the Bondholders' Protective Committee for the holders of bonds of The Western Tool & Manufacturing Company, named as Appellees in the above entitled proceedings and move the Court:

First, to dismiss the appeal in so far as it is attempted to be made in the name of The Western Tool & Manufacturing Company for the reason that there was no authority by said Company to attorneys for James G. Gurney or to any other person to give any notice of appeal of the proceeding sought to be appealed herein, nor have said attorneys now any authority to appear for said Company. (All of which appears by affidavits of the President and Secretary of said Company attached to the Motion of said Company to dismiss appeal herein.)

Second, to dismiss the appeal herein for the reason that, as appears from the certified record herein, the parties attempting to perfect an appeal herein have no appealable interest in the proceeding from which appeal is sought to be perfected.

Keifer & Keifer,
(512 M & M Building.)
(Springfield, Ohio),
Attorneys for said Moving Parties.

CAUSE ARGUED AND SUBMITTED

(February 7, 1944).

Before: Hicks, Allen and Hamilton, JJ.

This cause is argued by Charles W. Stiefel, Jr. for Appellant and by W. W. Keifer for Appellees and is submitted to the court.

JUDGMENT.

(Entered: April 21, 1944.)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this Court.

OPINION.

(Filed April 21, 1944.)

Before Hicks, Allen & Hamilton, Circuit Judges.

Hamilton, Circuit Judge. The Western Tool & Manufacturing Company is an Ohio corporation created in 1904 which since that time has been engaged in the business of manufacturing tools in its own equipped factory at Springfield, Ohio. The corporation has outstanding 1120½ shares of common capital stock, par value $100.00 per share.

In November 1921, the corporation borrowed $90,000.00 and to secure the payment thereof, executed a mortgage trust deed which covered all of its property then in existence or afterwards acquired, except cash, notes and accounts receivable and inventories.

On July 20, 1923, the owners of 602½ shares of the corporation's capital stock created a voting trust and appointed a committee consisting of Charles S. Deneen, W. T. Kettering, W. D. Hollister and Enoch J. Price. The shares were deposited with a trustee in exchange for receipts.

Opinion.

The purpose of the trust was to refund the mortgage indebtedness of the corporation at a lower interest rate and on more favorable terms. The voting trust was to continue until the payment or extinguishment of the mortgage indebtedness or a refundment of it, unless it earlier appeared that neither of these objects could be accomplished.

On November 1, 1923, the owners of the corporation's mortgage bonds formed a committee composed of Charles S. Deneen, W. T. Kettering, Edward I. Bloom, E. J. Price and W. D. Hollister. Subsequently, Deneen died and was succeeded by Roy Massena. All bonds, except $300.00 in amount, were deposited with the depository of the bondholders' committee. The voting trust and bondholders' committee were extant at the time of the institution of this action. Under the corporate charter, the Board of Direcors was composed of seven members to be elected at an annual meeting of the stockholders on the fourth Tuesday of January in each year. At a meeting of the stockholders March 28, 1941, the Board of Directors was reduced to five members.

On July 9, 1942, Owen N. Price, trustee under the mortgage deed of trust, filed in the Court of Common Pleas of Clark County, Ohio, a petition to foreclose the lien of the bondholders and on July 15, 1942, the Ohio court appointed W. T. Kettering operating receiver of the corporation's property and since that date he has operated it as a going concern.

The corporation filed its answer to the foreclosure petition admitting its allegations and consenting to the appointment of the receiver. On December 8, 1942, a judgment was entered on the mortgage against the corporation in the sum of $134,698.21, which was the principal sum due on the bonds together with eight percent interest.

James G. Gurney, acting for himself and on behalf of other owners of stockholders' depository receipts of the corporation, attempted to intervene in the state court

action and in connection therewith moved that the judgment of the state court be set aside. This motion was pending at the time the present action was instituted and no sale of the corporation's property under the state judgment had taken place.

On January 11, 1943, this action was begun ostensibly with the Western Tool & Manufacturing Company, petitioner, seeking relief under Chapter X of the Bankruptcy Act (11 U. S. C. A., Sec. 526 et seq.).

The facts pertaining to the foreclosure action in the state court are fully detailed in the petition in which it is further alleged that the value of the corporation's assets is greatly in excess of its liabilities and that no adequate relief can be obtained under Chapter XI of the Bankruptcy Act. The petition was signed: "The Western Tool & Manufacturing Co. By James G. Gurney." Filed with the petition was affidavit of Gurney in which he stated that he was the owner of seven shares of the corporation's capital stock and was the agent and attorney in fact for Stella K. Gurney, the owner of 66 shares, James Gurney, Jr., owner of 59 shares and Harlan T. Hyde, owner of 443½ shares.

Affiant also stated that W. T. Kettering, W. D. Hollister and Enoch J. Price, for the past three years, had exercised exclusively all the powers and rights of the Bondholders' Protective Committee and that they had likewise exercised all the rights and privileges of the voting trust. He further stated that these same individuals dominated the Board of Directors of the corporation through their own position on the board and by controlling Erna H. Wheeler and William J. Grimm who were employee-directors.

Affiant further said that Enoch J. Price for the purpose of misleading Harlan T. Hyde, stated in a letter to Hyde that it would be unnecessary for him to attend a stockholders' meeting to be held March 28, 1941, because nothing of importance would be considered then and that, relying on this statement, Hyde did not attend.

At this stockholders' meeting the charter of the corporation was amended reducing the number of members of the Board of Directors from seven to five. Stella G. Gurney, another stockholder, was given no notice of the meeting.

Affiant further stated that the charter of the corporation could not be amended without the attendance in person, or by proxy, of the owners of 673½ shares of the capital stock and that at the meeting held on March 28, 1941, at which the charter was amended, only 648½ shares of stock was represented and at the meeting held March 27, 1942, only 658½ shares of the capital stock were represented, at which meeting a new Board of Directors, now serving, was elected.

Affiant stated that because of the absence of sufficient stock ownership at the stockholders' meeting the election of the directors was void and that the corporation had been without a de jure board since March 28, 1941. Affiant also stated that the trustees of the voting trust had at all times acted adversely to the interest of the equitable owners of the stock and in the interest of the bondholders to the detriment of the corporation.

Affiant further stated that prior to July 20, 1923, the bondholders' committee agreed with the stockholders to cause a refunding of all the corporation's outstanding bonds at an interest rate not exceeding 4%, but that notwithstanding this agreement the trustees of the mortgage recovered 8% interest on said bonds in the foreclosure decree. It is further stated in the affidavit that the interlocking directors, trustees of the voting trust and the bondholders' committee have prevented the corporation from acquiring new, modern and efficient manufacturing equipment and have refused to employ for the corporation capable managers and operators. It is also stated that the voting trust terminated before the institution of this action because of the failure of its purpose and that the depositing stockholders have tendered to the depository of the voting trustees their stock receipts and de-

manded a return of their stock certificates, all of which has been refused.

Affidavit states that the equitable owners of the corporation's stock demanded of the Board of Directors of the corporation that it institute the present action but that the board notified the stockholders that no such action would be instituted and that a sale of the corporate assets would be made under the foreclosure decree in the state court.

The trial court approved the petition as filed in good faith, enjoined the further prosecution of the foreclosure action in the state court and continued the cause for further hearing. Subsequently the bondholders' committee and the corporation by its president and secretary moved to dismiss the petition on the following grounds: (1) that the petition was filed without authority of the Board of Directors of the corporation and without the knowledge, assent or authority of any of its officers; (2) that because of the fact the bondholders were the only creditors of the corporation and that they were opposed to any plan of reorganization, it was impossible of accomplishment; (3) that the petition was not filed in good faith and that James G. Gurney owned only three shares of the capital stock of the corporation and was without authority or legal right to act for and on behalf of the corporation and that said Gurney filed said petition in his attempt to dictate the policy and management of said corporation for his own personal benefit, and to delay and defeat the corporation in its purpose to pay its bonded indebtedness.

The court heard evidence on the respective motions to dismiss. It made no finding of fact or conclusion of law, but stated, "Upon a consideration of the facts as disclosed by the record in the instant case, the court is of opinion that James G. Gurney and his associates do not bring themselves within the rule laid down in Hawes v. Oakland, 104 U. S. 450.

"Upon a consideration of the whole of the record, the briefs and arguments of counsel and applicable law, the

court is of the opinion and so finds that the motion hereinbefore referred to of the Bondholders' Protective Committee is well taken and it should be and is sustained." The court entered an order dismissing the proceedings from which order this appeal is prosecuted.

Rule 23(b) of the Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), provides in substance that in an action brought to enforce a secondary right on the part of one or more shareholders in a corporation because the corporation refused to enforce the right which may be properly asserted by it, the complaint shall be verified by oath and state that plaintiff was a stockholder at the time of the transaction of which he complains or that the shares thereafter devolved on him by operation of law and that the action is not collusive for the purpose of conferring jurisdiction. The complaint shall also set forth with particularity the efforts made by plaintiff to secure from the managing directors or trustees or from the stockholders the action he desires and the reason for his failure to obtain such action or the lack of effort on his part to obtain such action.

The above rule supersedes the decisions of the federal courts on procedural requirements in derivative shareholders' actions. It may be that under the doctrine of Erie v. Tompkins, 304 U. S. 64, the provisions of the rule in question must yield to state law—Gallup v. Caldwell, 120 F. (2d) 90 (C. C. A. 3)—but as we view the allegations of the petition in connection with the supporting affidavit, there is a substantial compliance with the procedural requirements of the rule insofar as it is applicable and it becomes unnecessary to determine whether or not the local law of Ohio applies. In any event, there is no distinction between the federal and state law material to the decision here. Jensen v. Republic Steel Corporation, 32 Ohio Law Abstract 29. Rule 12(e) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), provides that "a bill of particulars becomes a part of the pleading which it supplements."

Opinion.

Treating the affidavit of Gurney as a bill of particulars, it is clear that he was a shareholder of the corporation at the time of the transactions of which he complains and that the action in no sense could be collusive because he seeks on behalf of the corporation a remedy provided under the laws of the United States and enforceable only in its courts. There can be no doubt that any effort on Gurney's part to secure action by the corporation through its directors or stockholders' committee would have been futile. Under such circumstances, it is unnecessary for the stockholder complainant to set forth with particularity his efforts to secure from the managing directors such action as he desires and the reason for his failure to obtain it. The rule does not apply if from all the circumstances of the case, it is made to appear with reasonable certainty that the directors cannot or will not bring the action and that a demand on the stockholders would be futile. Delaware & Hudson Co. v. Albany & Susquehanna R. Co., 213 U. S. 435, 452; Ashwander v. Valley Authority, 297 U. S. 288, 318, 323.

A corporate reorganization proceeding under Chapter X of the Bankruptcy Act is instituted by the filing of a petition, the formal requisites of which, as well as other papers filed in the proceedings, are the same in general as similar papers in ordinary bankruptcy actions. General Orders 5, 52. A petition for the reorganization of a corporation eligible for reorganization under the Act may be filed by the corporation. Bankruptcy Act, Sec. 126 (11 U. S. C. A. 526).

There is no rule enunciated in the statute for intercorporate action authorizing the institution of the proceedings. Whether the equitable owners of the stock of a corporation may institute such proceedings depends upon the laws of the state creating the corporation. In re De Camp Glass Casket Company, 272 F. 558 (C. C. A. 6).

Usually directors are the primary source of authority in acting for a corporation in filing a proceeding in bank-

ruptcy reorganization. However, when the Board of Directors refuse to act and it is made to appear that the directors have an interest antagonistic to the corporation, the equitable owners of the stock of a corporation may file the petition under the act on behalf of their corporation. In such a case a bankruptcy court will look beyond the corporate body as a legal entity distinct from its members and disregarding the fiction, will recognize the fact that a corporation is in reality an association of individuals for the purpose of private gain and that though the members have not the legal title to the assets they are nonetheless beneficial owners.

Under the laws of Ohio, equitable owners of the stock of a corporation under proper circumstances have the power in the name of the corporation to take advantage of the bankruptcy reorganization statute. Henry v. Jeanes, et al., 47 O. S. 116; Goslin v. Cincinnati & M. Canal Company, 18 O. S. 169; Buckeye Garage Company v. Caldwell, 18 C. C. (N.S.) 429 (Ohio); Jensen v. Republic Steel Corporation, supra; Garage & Sales Co. v. Caldwell, 18 O. C. C. (N.S.) 429. Such a proceeding is the corporation's action, only set in motion, because the corporation was made helpless by the erring directors. Larwill v. Burke, 19 O. C. C. 449 (aff. in 66 O. S. 683).

It is an application of the rule that in legal effect a stockholder's suit is one by the corporation, conducted by the stockholder as its representative. In such a proceeding, the corporation is the real party in interest.

Traditionally, corporate reorganization may be effected by a readjustment of the company's securities. It was a common practice prior to the enactment of Section 77B or of Chapter X for a corporation which had issued bonds secured by a mortgage and where the corporation had become embarrassed and unable to pay the interest, to effect a recapitalization by voluntary agreement with the stockholders and bondholders under which the stock and bonds or the bonds only of the company were readjusted so as to enable the company to continue busi-

ness and avoid foreclosure of mortgages on corporate property, the stockholders sometimes taking new stock of less par value and the bondholders surrendering their bonds in exchange for new ones with readjusted interest rates and maturities and sometimes by refinancing through a new bond issue. Gilfillan v. Union Canal Company of Pennsylvania, 109 U. S. 401. Under such proceedings for voluntary recapitalization directors acted in such matters only with the consent of the stockholders. It was recognized that the stockholders or members of the corporation themselves had the exclusive power to take the necessary steps to bring about a recapitalization.

Chapter X of the Bankruptcy Act was designed to facilitate the recapitalization or reorganization of corporate businesses and for this purpose there was brought within the ambit of the bankruptcy court all of the instruments or methods theretofore used by corporations, creditors and stockholders in effecting recapitalizations or reorganizations. Corporations should not be deprived of the benefits of the Act because their directors are in no position to act freely to obtain them, or will not so act in behalf of the corporation, and to so decide would destroy one of the purposes of the Act.

Based on the concept that the primary interest of a stockholder in a corporation is its continuance as a going concern, there is a vast amount of legal literature as to the right of a shareholder to bring a derivative suit on behalf of his corporation but the rule of the right, so far as applicable here, may be stated in brief: (1) Courts will not, at the instance of a stockholder, interfere in the management of a corporation in any case so long as the acts complained of are within the power of the corporation and are the result of the fair and honest judgment of the corporation acting through its officers; (2) Where the acts of which the stockholder complains are within the power of the corporation, but are so injurious to the corporation and through it to at least a part of its stockholders that it is apparent that the cor-

poration has not exercised a fair and honest judgment in the matter, then the courts will interfere but only as a last resort, namely after the Board of Directors have been given a chance to rectify the wrongful acts if it is made to appear that because of conflicting loyalties or fraudulent conduct, the directors are incapable of acting with fair, open and unprejudiced minds. Hawes v. Oakland, supra; Jensen v. Republic Steel Corporation, supra.

We are not here dealing with the details of the corporate business, but with a corporate act which is confiscatory of the rights of its shareholders. Neither the Board of Directors nor a majority of the shareholders may depive a minority shareholder of his interest in the coporation if there is an equitable way open to protect that interest along with that of all the other shareholders.

If there is a valid remedy against the claim of the bondholders in the present case which the Board of Directors could have invoked, but which they failed to do and the foreclosure action will damage the interests of the stockholders, the refusal of the board to invoke the remedy would of itself constitute such gross neglect on their part as to require the court to permit their interested cestuis que trustent, the stockholders, to pursue the remedy on behalf of the corporation. Dodge v. Woolsey, 59 U. S. 331, 342; Farmers Loan & Trust Company v. Toledo A. A. & N. M. Ry. Co., 67 F. 49 (C. C. Ohio).

Under Chapter X, Section 137 of the Act (U. S. C. A., Title 11, Section 537) a stockholder is expressly given an absolute right to intervene and file an answer to a corporate reorganization petition where the debtor is not insolvent. This is an independent right of a party in interest. Bankruptcy is an equitable proceeding and bankruptcy courts administer the law according to the spirit of equity, so there can be no valid reason why a stockholder, where the necessary prerequisite facts appear, may not either sue or defend on behalf of the corporation in a reorganization proceeding either in his own name or in the name of the corporation. Ogden v.

Gilt Edge Mines Company, 225 F. 723 (C. C. A. 8); Zeitinger v. Hargadine-McKittrick Dry Goods Company, 244 F. 719 (C. C. A. 8); Whittiker v. Brietson Mfg. Co., 43 F. (2d) 485 (C. C. A. 8)); United States Lines v. United States Lines Company, 96 F. (2d) 148 (C. C. A. 2). Since the suit is in equity, an equitable owner of the shares of a corporation has the same rights as a stockholder with the legal title. Fletcher Cyclopedia, Corporations, Permanent Ed., Vol. 5, Sec. 2092, page 326 and Vol. 13, Sec. 5976, page 349; Application of Bacon, 287 N. Y. 1, 38 N. E. (2d) 105.

Prior to the passage of the Act providing for corporate reorganizations, neither proceedings under the prior Act nor receiverships in equity, furnished adequate relief for distressed corporate debtors, their creditors and their stockholders. Equity receiverships and foreclosures were inadequate because no method existed for continuing enterprises as going concerns. Usually the intangible assets of corporations were sacrificed in a sale of the tangible property in satisfaction of lien debts, because the property of the corporation as a going concern was sold at an inadequate price and was usually bought in by a committee of bondholders with the result that non-assenting bondholders received little and stockholders nothing at all.

The purposes of the legislation were (1) to avoid immediate liquidation of the property involved in the reorganization of a corporation with a view to rehabilitating rather than liquidating, (2) to afford a respite to corporations in financial difficulties so the owners and creditors might have time to recapitalize or refinance and to preserve for all parties concerned intangible values which are usually a part of the assets of all going businesses and inseparable from its tangibles and (3) to give the holders of bonds of the corporation an opportunity to have it reorganized in lieu of liquidation under foreclosure. Continental Bank v. Rock Island Railway, 294 U. S. 648; Securities Commission v. U. S. Realty Company, 310 U. S. 434.

Section 414 of the Act (U. S. C., Title 11, Sec. 541) provides in substance that upon the filing of a petition by a debtor, the judge shall enter an order approving the petition if satisfied it has been filed in good faith or dismiss if it not so satisfied.

Section 146 of the Act (U. S. C., Title 11, Sec. 546) provides in substance that without limiting the meaning of the term "good faith" a petition shall be deemed not to be filed in good faith if it is unreasonable to expect that a plan of reorganization can be effected or if a prior proceeding is pending in any court and it appears that the interest of creditors and stockholders would be best served in such prior proceeding.

The rule is well established that a petition for reorganization under Chapter X of the Bankruptcy Act should be dismissed as not filed in good faith within the meaning of Section 146, if there is no reasonable expectation that the company could reorganize as a going concern and the rule also is well established that the party filing the petition under Chapter X while a prior proceeding is pending in a state or federal court, has the burden of showing that the interest of creditors and stockholders would be best served by a reorganization in bankruptcy. Fidelity Assurance Ass'n. v. Sims, 318 U. S. 608; Marine Properties v. Trust Company, 317 U. S. 78.

There is no good faith in a petition filed by stockholders in the name of a debtor unless it is shown that under some reasonable plan of reorganization such stockholders would retain an interest because persons without a pecuniary interest have no judicial standing in any court. The existence or non-existence of good faith in filing a creditor's petition for corporate reorganizations must be determined by the trial court in its discretion upon the evidence. The question is one of fact. In re Mt. Forest Fur Farms of America, 103 F. (2d) 69 (C. C. A. 6). Since the trial court made no findings of fact and made no reference in its decision to the question of good faith, we do not pass upon that issue, although appellees

insist on it. We are of the opinion that under the facts the equitable owners of the stock of the debtor were authorized to institute these proceedings.

The cause is reversed and remanded for further proceedings in accordance with this opinion.

Hicks, dissenting. I find myself out of harmony with the decision. It is a well-settled principle of equity jurisprudence that a stockholder has a right in a plenary suit to seek redress for wrongs done to a corporation where the proper officers thereof refuse to do so, but no such case is presented. Here, a dissatisfied stockholder endeavors, in the name of the corporation, to reorganize it under Chapter X of the Bankruptcy Act. This I think he cannot do. I find nothing in Chapter X that gives jurisdiction to the bankruptcy court for such purpose. From my viewpoint the proceedings under Chapter X are not intended therefor. They are intended for corporation reorganization purposes only; and according to Article I, Sec. 101, the provisions of the Chapter apply exclusively to proceedings thereunder. Of course a corporation has the right to file a petition for reorganization puposes but I think that the term "corporation" used in Chapter X refers to a corporation in the ordinary sense. It means a corporation as defined in the Act itself. I think that to allow Gurney to use the name of the corporation for reorganization purposes would imply jurisdiction in the bankruptcy court nowhere granted. It would require that court, before it reached the reorganization feature, to settle and determine all the complaints which Gurney, purporting to represent a class, makes against the directors, etc. It is rather clear to me that in his affidavit, attached to the petition, he sets forth enough, which, if properly averred in a bill in equity, would constitute good pleading, but for some reason not altogether apparent, he did not pursue that remedy.

From my viewpoint the appeal should be dismissed.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Sixth Circuit

No. 9665

In the Matter of the Reorganization of THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation,

Debtor.

JAMES G. GURNEY, Individually, etc.,

Petitioner-Appellant,

vs.

ROY MASSENA, et al.,

Respondents-Appellees.

PETITION FOR REHEARING

(Filed May 10, 1944)

The Appellees respectfully request a rehearing of this case and for ground therefor say:

It appears to Appellees that the majority of the Court have misapprehended some aspects of the situation.

The ground of the reversal would seem to be that a stockholder can file a petition for reorganization when the directors wrongfully fail to do the thing the stockholder seeks to have done. In such a case therefore it would necessarily have to appear in the record that there was some such misconduct or wrongdoing. We find nothing

in the Opinion to this effect but only statements to the effect that Gurney, the stockholder, *alleged* in his Petition or Affidavit things claimed to be wrongful.

In this connection we respectfully call attention to that part of the Opinion (p. 4) where it is said that the affiant (Gurney) stated that "the bondholders' committee had used money of the corporation for the purpose of acquiring certificates of deposit from bondholders and had treated these certificates of deposit as the property of the bondholders' committee and that in the foreclosure proceedings, such bonds were treated as wholly unpaid and were included in the judgment at their par value." This statement is wholly incorrect. The Petition (p. 2) sets forth the fact that the *Company* purchased the $16,600.00 of bonds and that thereby the same were canceled, which is the exact fact. In Gurney's Affidavit (R. 7) it is stated that the directors "utilized funds of the corporation to purchase and acquire Certificates of Deposit of first mortgage bonds of the face or par value of Sixteen Thousand Six Hundred ($16,600.00) Dollars" but it is not stated that they purchased them for the Committee and this evidently was not meant for Gurney testified (R. 32) that he knew the Company purchased bonds from the bondholders, that he knew they were being purchased and approved of it. This $16,600.00 of bonds purchased reduced the total issue of $90,000.00 to $73,400.00 outstanding as stated in the Petition. (R. 2). $89,700.00 of bonds were deposited with the Bondholders' Committee. (The remaining $300.00 of bonds seem to have disappeared for they were not heard from for many years and are deemed to have become barred by the statute of limitations. R. 58, 60). A directors' meeting of September 6, 1941, Gurney being present, authorized the purchase of certificates of deposit of bonds. (R. 49). Perhaps misapprehension of this fact

had considerable to do with causing a belief on the part of the directors. As a matter of fact we felt, as stated in our Brief, (p. 16) that this purchase of bonds *for the Company* was evidence of good faith and fair dealing on the part of the directors.

Confusion may have arisen from the averment (R. 2) as to $16,000.00 having been paid by the Company to the Bondholders' Committee on June 16, 1942, "to be applied upon the indebtedness evidenced by the bonds," which was an entirely different matter. There was of course nothing wrongful in thus making a partial payment on an overdue debt. Gurney in his Affidavit (R. 7-8) says the Committee had not accounted herefor, which is directly contradictory to the allegations in the Petition above referred to and to the fact.

Allow us to call attention to the statement in the Opinion (p. 3) that Erna H. Wheeler and William J. Grimm neither owned stock. We find nothing in the Gurney Petition or Affidavit to this effect, nor in the testimony. The fact is that at least Mrs. Wheeler owns stock in her own right purchased by her long ago. Again, it is said (p. 4) that the Board of Directors notified the stockholders that no action to reorganize would be instituted and that a sale of the corporate assets would be made under the foreclosure decree. We find no basis for this statement in the record, either in the testimony or averments of Gurney.

The Opinion recites a number of allegations of the Petition and of the Gurney Affidavit. It would seem that in order to justify allowing a stockholder to file a petition for the Company it should be made to appear as a *fact* (not merely a claim or charge) that there had been some misconduct on the part of the officers or directors of the Company. The Opinion does not refer to any of the evidence. The Court below evidently found that there was

of the majority of the Court that there had been some misconduct on the part

no proof of misconduct and we suggest that it should appear what misconduct, if any, the reviewing court finds in the Record.

We ask leave to call attention to matters referred to as alleged by Gurney in justification of filing the Petition and to the lack of evidence to support them:

1. Gurney's Petition says the value of the assets of the Company is greatly in excess of the indebtedness. (R. 3). It nowhere appears in the evidence that the assets are in excess of its liabilities. On the contrary it appears from the financial statements offered by Gurney (R. 84-6) that the assets are not worth the liabilities by $51,608.08; being that much short of anything for stockholders. This, we believe, was the only evidence on the subject. This failure to show the solvency of the Company is in effect a failure to show "that under some reasonable plan of reorganization such stockholders would retain an interest," as stated in the Opinion, p. 10.

2. Attention is called to the letter written to Harlan T. Hyde in which it was stated that it would be unnecessary for him to attend a stockholders' meeting. This letter (R. 73) was not from Enoch J. Price, as stated in the Opinion (p. 3) but from Mrs. Wheeler. It is alleged in the Affidavit (R. 6) that this was at the direction of Enoch J. Price, but that was denied and there was no evidence to prove it. It nowhere appears that this statement was the cause of any harm to stockholders or occasioned any wrongdoing. It was a careless statement of Mrs. Wheeler, entirely on her own initiative, but it was at a time when the Company was extremely hard up and her eagerness for economy suggested that the expense of Mr. Hyde coming from Florida was not worthwhile. It was probably occasioned by the knowledge that the expenditure would be of no value to the Company. Her zeal for economy

bore good fruit in the Company's years of depression and loss. Hyde was immediately notified of the action at the meeting (R. 74) and made no objection. Neither did Gurney, who subsequently attended at least one directors' meeting. (R. 48-9). Furthermore, if the two stockholders' meetings were invalid because stockholders failed to attend, that does not constitute misconduct on the part of the directors which would justify a stockholder acting for the corporation in beginning a proceeding to reorganize under Chapter X.

3. It certainly is not a justification of such unusual action by a stockholder to state that the directors at all times acted adversely to the interest of the equitable owners and in the interest of the bondholders, without some definite statement of such adverse action and proof thereof.

4. We have already commented upon the untrue statement that the directors had utilized funds to purchase bonds for the Bondholders' Committee and showed that the purchase was for the corporation in the interest of the stockholders and perhaps adverse to the interest of the bondholders.

5. The averment that there had been an agreement prior to July 20, 1923, to cause a refunding of the bonds at an interest rate not exceeding 4 per cent is not important since there is no testimony to support the statement, especially when it appears from the Gurney Petition (R. 2) that the Company paid interest at 8 per cent for a time and at 6½ per cent and 6 per cent for many years after July 20, 1923, all without objection, so far as appears in the Record; and this notwithstanding that Gurney was a director from 1929 up to the present. (R. 31).

Perhaps the statement in Mr. Enoch J. Price's letter to Judge Oxford of June 26, 1941, (R. 68) referring to "the

plan of the Committee to reduce the unpaid interest rate to four per cent" may be considered to support the Gurney claim of reduction of interest rate, but that statement only relates to a "plan" which evidently was not carried out and not authorized by the bondholders. Likewise the testimony of Gurney (R. 31) that Mr. Price admitted that it had been agreed by the Committee that the rate of interest be reduced was nothing more than that at one time the Committee had been willing on certain terms to reduce the rate, which of course was not consummated and not authorized.

Conceding for the moment that there was a real dispute about the rate of interest, the bondholders must be recognized at least as acting in good faith, until the contrary is shown. The time for contesting the amount due on the bonds was past before the Gurney Petition was filed.

6. What is the importance of the allegation in Mr. Gurney's Affidavit that the directors did not acquire what he considered new, modern and efficient equipment and refused to employ managers and operators that he suggested? Those were matters of business judgment entrusted to the directors and whether they exercised the best possible judgment looking at it from the present is not important. But the present success of the Company is some evidence that their judgment and policy were not wholly at fault.

We find no other mention or reference in the Opinion to misconduct or allegations of misconduct.

Looking now at the proof offered we call attention to the fact that Gurney wholly failed to substantiate any evidence of misconduct.

Gurney had every opportunity to raise any question or make any defense that he believed should be made in the foreclosure case. He had notice of that proceeding

from July 10, 1942, (the day after the suit was filed), (R. 21), and of all action taken or contemplated therein up to December 8, 1942, when the decree was rendered, and made no attempt to intervene or raise any question therein. It is inconceivable that the State Court would not have given him every opportunity to contest any matter that appeared at all debatable. No excuse is suggested for this neglect.

As to the specific things suggested as wrongful:

The bringing of the foreclosure is spoken of as such. It was brought by the Trustee for the bondholders pursuant to his duty. No reason is proved or suggested that there was not a perfect right to foreclose for the long past due defaults.

Did the directors have a *legal duty* to file a petition under Chapter X, when there was only one creditor and that one opposed to reorganization? Was not the matter of attempting a reorganization a matter wholly of discretion and business judgment depending upon business conditions, prospects in the industry, etc.?

The burden of course was upon the petitioner to show ground to entitle him to intervene and act for the Company and no such showing was made.

The Opinion seems to assume that this record shows some ground to justify the stockholder's action but nothing is said on this subject except to quote from Gurney's Petition and Affidavit. Surely it is not sufficient to rely on claims or averments of a party upon whom the burden of proof rests. The law laid down in *Hawes* v. *Oakland*, 104 U. S. 450, was in part carried into Equity Rule 27 and Rule 23(b) of Rules of Civil Procedure, but we respectfully suggest that these rules did not supersede the pronouncement of the Supreme Court in *Hawes* v. *Oakland* as to what must be shown to entitle the stockholder to pro-

ceed. (See Syl. 1 and pp. 456-7, 460-1). These things, or some of them, "must *exist* as the foundation of the suit."

It seems conclusive to us that the record shows that reorganization is impossible because of the opposition of all the creditors. The burden was on Gurney, as the Opinion expressly declares, to show "reasonable prospect," but no attempt to show such reasonable prospect was made. In fact, it is clear that there is no prospect. All creditors are represented in the present proceeding and they appear in opposition. It was up to Gurney to show, if he could, that they were not fairly represented. According to the Witherbee case, (88 Fed. 2nd 251), the Committee is entitled to represent the deposited bonds until a bondholder withdraws with the consent of the court.

In this situation the question arises as to why send the case back to the District Court to hear and pass upon a question that is clearly settled by this record. Some showing should have been made to justify the expense, delay, and resulting loss to the interested parties.

It is said that the District Court did not pass upon the good faith of the Petition. If this is true it would not justify a remanding for the Record shows that there was not, within the meaning of the statute, good faith.

The remanding to the District Court merely invites delay, expense, and a frittering away of the assets of this concern to the great loss to the parties really interested, the bondholders, who loaned their money to this corporation more than twenty-two years ago and ever since have upheld the concern and given it and the stockholders every chance to recuperate and put it on its feet.

Respectfully submitted,

KEIFER & KEIFER,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

It is hereby certified that the Appellees' Petition for Rehearing is filed in good faith for the purpose of obtaining a rehearing of this case, is not for delay and, in the opinion of counsel, states a meritorious case for such rehearing.

WM. W. KEIFER,
of Counsel for Appellees.

(Signed Certificate is filed with the printed copies of the Petition for Rehearing.)

ORDER ON PETITION FOR REHEARING

(Entered June 1, 1944.)

The opinion rendered in this cause on April 21, 1944, is amended by striking from the third full paragraph, last line, page 3, the following: "neither owing mortgage bonds nor corporate stock," so that the sentence ends with the word "directors" and also by striking from the first full paragraph, line 8, page 4, the following: "and that the bondholdes' committee had used money of the corporation for the purpose of acquiring certificates of deposit from bondholders and had treated these certificates of deposit as the property of the bondholders' committee and that in the foreclosure proceedings such bonds were treated as wholly unpaid and were included in the judgment at their par value," so that the sentence ends with the word "corporation."

Appellee's petition for rehearing is denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of James G. Gurney, Individually etc. vs Roy Massena, et al. No. 9665, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 29th day of July, A. D. 1944.

J. W. Menzies,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5542)

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No. 410

In the

Supreme Court of the United States

October Term, 1944

IN THE MATTER OF PROPOSED REORGANIZATION OF THE WESTERN TOOL & MANUFACTURING COMPANY, A CORPORATION,
Debtor,

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and ROY MASSENA, E. J. PRICE, W. D. HOLLISTER and W. T. KETTERING, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.,
Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co., and The Western Tool & Manufacturing Company, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

WM. W. KEIFER,
HORACE S. KEIFER,
GEORGE W. TEHAN,
Counsel for Petitioners.

SUBJECT INDEX

	Page
Petition for Writ of Certiorari.	1
Statement of Matter Involved.	2
Questions Involved.	3
Jurisdiction of Supreme Court.	3
Reasons for Allowance of Writ.	4
Brief in Support of Petition for Certiorari.	6
I Opinions of Court Below.	6
II Jurisdiction.	6
III Statement of Case.	6
IV Specification of Errors.	11
V Argument	12
(a) Stockholder has no Authority to File Petition Under Chapter X	12
Board of Directors Must Act to Authorize Petition.	13
(b) No Misconduct Authorizing Stockholder to File Petition.	16
Voting Trust is Valid	19
As to claim that Directors Illegally Elected	20
As to Defacto Directors.	21
Rate of Interest.	22
Rate of Interest Adjudicated.	23
Laches of Complaining Stockholder.	24
(c) Corporation had no Duty to File Petition for Reorganization.	24
(d) Was Corporation Guilty of Wrongful Conduct in Not Making Defense in Foreclosure Suit?	25

Page

(e) Corporation was not Solvent and Hence Stockholder had no Interest in Reorganization. 26

(f) No Reasonable Expectation that Plan of Reorganization can be Effected. 27

(g) No Right to Displace or Modify Liens..... 30

(h) Prior Pending Proceeding will Best Subserve Interested Parties. 31

LIST OF CASES

Bryan v. Welch, 74 Fed. 2nd 964 13

Case v. Los Angeles Lumber Co., 308 U. S., 106 31

Clarke v. Thomas, 34 O. S. 46, 58 21

Con. Rock Prod. Co. v. DuBois, 312 U. S. 510 30

Ehrman v. Union Central Life Ins. Co., 35 O. S. (324), 339 21

Fidelity Assurance Assn. v. Sims, 318 U. S. 608, 619....29-31

First Pres. Society vs First Pres. Society, 25 O. S. (128) 133 21

First Pres. Society v. Rogers, 12 O. S. 248, 251 21-22

Hawes v. Oakland, 104 U. S. 450, 460 16

In re Arcadia Furniture Co., 12 Fed. Sup. 477 13

In re Francfair, Inc., 13 Fed. Sup. (513), 514 30

In re Newport Corp., 98 Fed. 2nd 453, 455-6 13

In re Phila. Rapid Transit Co., 8 Fed. Sup. 51 28

In re Phoenix Hotel Co., 13 Fed. Sup. 229, 83 Fed. 2nd 724 13

In re Picadilly Realty Co., 78 Fed. 2nd 257, 260-1 13

In re Pittsburgh Terminal Coal Corp., 30 Fed. Sup. 106; 109 Fed. 2nd 1020 13

In re Reliable Estates, Inc., 33 Fed. Sup. 588, 589 30-31

In re South State St. Bld. Corp., (7th Cir.) 140 Fed. 2nd 363 25

Page

In re 325 E. 72nd St., 53 Fed. Sup. 997 31
In re Wickwire Spencer Steel Co., 12 Fed. Sup. 528 23
In re Witherbee Corp., 88 Fed. 2nd 251, 255-6 28
Institutional Investors v. C. M. St. P. & P. R. R., 318 U. S. 523, 543-4 27
Manati Sugar Co. v. Mock, 75 Fed. 2nd 284, 285 28-29-30
Marine Harbor Properties v. Mfrs. Trust Co., 317 U. S. 78, 87 L. Ed. 73, 78, 84 30-31
Seaboard Terminals v. West. Md. Ry., 108 Fed. 2nd 911 30
Sec. & Ex. Com. v. U. S. Realty Co., 310 U. S. 435 30
Tenn. Pub. Co. v. Am. Natl Bank, 81 Fed. 2nd 463 29
Tenn. Pub. Co. v. Am. Natl Bank, 299 U. S. 18 32
Voeller v. Neilston Warehouse Co., 311 U. S. 531 14
Warren v. Pim, 66 N. J. Equity 353, 408 19
White v. Penelas Min. Co., 105 Fed. 2nd 726 14

RULES

Civil Procedure Rules 23(b) 17
Equity Rules 27 17

STATUTES

Bankruptcy Act, Sec. 126 (U. S. C. Title 11, Sec. 526) 12
Bankruptcy Act, Sec. 106 (U. S. C. Title 11, Sec. 506) 12
Bankruptcy Act, Sec. 179, (U. S. C. Sec. 579) 27
Bankruptcy Act, Sec. 146 (3) 28
Bankruptcy Act, Sec. 146 (11 U. S. C. Sec. 546) 31
Bankruptcy Act. Sec. 141 28
Sec. 347 (a) U. S. C. 3-6

Page

TEXTS

14 Cor. Jur. 918, n. 9 19
1 Davies Ohio Corp. Law, p. 790, par. 10 21
10 Remington on Bankruptcy (5th Ed.) Sec. 4434, p. 330 14
10 Remington on Bankruptcy (5th Ed.) Sec. 4673 23
10 Remington on Bankruptcy (5th Ed.) Sec. 4457, p. 347 28

Supreme Court of the United States

October Term, 1944

No. .....

IN THE MATTER OF PROPOSED REORGANIZATION OF THE WESTERN TOOL & MANUFACTURING COMPANY, A CORPORATION,

Debtor,

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and ROY MASSENA, E. J. PRICE, W. D. HOLLISTER and W. T. KETTERING, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.,

Petitioners,

VS.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co., and The Western Tool & Manufacturing Company, a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

The Petition of Owen N. Price, Trustee for Bondholders under the Mortgage Deed of Trust of November 1, 1921, of The Western Tool & Manufacturing Co., and Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering, the Bondholders' Protective Committee for holders of said bonds of The Western Tool & Manufacturing Co. respectfully shows:

STATEMENT OF MATTER INVOLVED

1. The proceeding was begun in the District Court of the Southern District of Ohio, Western Division, at Dayton, by a Petition filed by James G. Gurney, (R. 1-4), professedly under Chapter X of the Bankruptcy Act, for reorganization of The Western Tool & Manufacturing Company, a corporation. It purports to be a Petition of the Company and it is signed, "The Western Tool & Manufacturing Co., by James G. Gurney." There was no authority from the Company for Gurney to file a Petition and none is claimed. The Petition does not disclose that Gurney had any connection with the Company nor any authority to sign or file the Petition for the Company. The Affidavit attached to the Petition, (R. 4-9) sets forth that James G. Gurney is a stockholder and was the agent and attorney-in-fact for certain other stockholders, though it is not stated that they joined in the Petition or that James G. Gurney acted for them in filing the Petition.

The Bondholders' Protective Committee filed a Motion (R. 13) to dismiss the Petition upon the grounds (1) that it was filed without authority of the corporation, (2) that it was unreasonable to expect that a reorganization could be effected since the only debts were the bonds which were all held by the Bondholders' Committee, and (3) that the Petition was not filed in good faith. A like Motion was filed by Owen N. Price, Trustee for the mortgage bondholders. (R. 63).

After a hearing the District Court, (Opinion, R. 90), sustained the Motion to dismiss the Petition for the reasons that stockholders had no authority to file a petition for reorganization of a corporation under Chapter X and did not come within the rule of *Hawes* v. *Oakland*, 104 U. S. 450. (R. 95).

2. Notice of Appeal was filed, (R. 97), in the name of The Western Tool & Manufacturing Co., signed by the attorneys for Gurney, professing to appear as attorneys for the Company. It appears from affidavits of the President and Secretary of the Company, (R. 109-110) attached to the Motion to dismiss the appeal, (R. 109), that no authority was given by the Company to give notice of appeal nor did the attorneys for Gurney have any authority to appear for it. This was not controverted. The Court of Appeals did not pass upon the Motion to dismiss the appeal.

3. The Circuit Court of Appeals for the Sixth Circuit reversed the judgment of the District Court, (Opinion, R. 112-124, Judgment, R. 112), and remanded for further proceedings, Presiding Judge Hicks dissenting, (R. 124).

QUESTIONS INVOLVED

4. The questions involved are whether a stockholder without authority from the corporation can file a petition under Chapter X of the Bankruptcy Act for reorganization of the corporation and whether the facts appearing in this record made a case for a stockholder to so act. The Circuit Court of Appeals held that the stockholder could so act.

JURISDICTION OF SUPREME COURT

5. This Court has jurisdiction to review the judgment of the Circuit Court of Appeals under Section 347(a) U. S. C. (Judicial Code Section 240(a)), this cause having been a civil case in the Circuit Court of Appeals.

The date of the Judgment to be reviewed is April 21, 1944, (R. 124); a Petition for Rehearing was filed May

10, 1944, (R. 125), (within the time provided for in the Rules of the Circuit Court of Appeals), and such Petition was denied June 1, 1944. (R. 135).

REASONS FOR ALLOWANCE OF WRIT.

6. The Petitioners say that there was error in the holding and judgment of the majority of the Circuit Court of Appeals in the following matters:

(a) In holding that a stockholder has the right under Chapter X of the Bankruptcy Act to file a petition for reorganization of the corporation.

(b) In holding that there was misconduct or wrongdoing on the part of the directors which authorized a stockholder to file a petition under Chapter X.

(c) In (apparently) holding that the corporation should have filed a petition for reorganization.

(d) In (apparently) holding that the corporation should have made defense in the suit for foreclosure.

(e) In not holding that the corporation was insolvent and that therefore the stockholder had no interest entitling him to initiate or participate in a proceeding for reorganization.

7. There are special and important reasons for granting the writ because the questions involved are of public and great general interest in this, that they are matters arising under Chapter X of interest to the business world and the courts and they have not been authoritatively passed upon by the courts.

The questions arise under a Federal statute and involve the meaning and interpretation thereof. They should therefore be determined and settled by the highest Federal tribunal. The holdings and opinion of the majority

of the Circuit Court of Appeals should not be allowed to stand as authority on these questions. That there is at least doubt as to the decision is shown by the fact that one Circuit Judge, (Judge Hicks,) dissented and agreed with the District Judge, thus two judges of the courts below are on each side of the questions decided.

Errors above referred to are considered in the brief hereto attached.

8. WHEREFORE, the Petitioners pray that a Writ of Certiorari may be issued by this Court to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of that Court rendered in said cause April 21, 1944; that said judgment be reversed and for such other and further relief as may be proper.

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and ROY MASSENA, E. J. PRICE, W. D. HOLLISTER and W. T. KETTERING, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.

Petitioners.

WM. W. KEIFER,
HORACE S. KEIFER,
GEORGE W. TEHAN,
M. & M. Building,
Springfield, Ohio.
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Court Below

The opinion of the majority in the Circuit Court of Appeals and the dissenting opinion of Judge Hicks are reported in Volume 142, Fed. 2nd, pp. 404, 411, and are found in the Record herein at pages 112-124.

II

Jurisdiction

This was a civil case in the Circuit Court of Appeals and the statutory provision which sustains the jurisdiction of this Court is Section 347(a) U. S. C., (Judicial Code, Section 240(a).

III

Statement of the Case

A statement of the proceedings in this case has already been given in the Petition herein in Paragraph 1 thereof. A statement of the facts under which this controversy arose is as follows:

The Western Tool & Manufacturing Company, a corporation under the laws of Ohio with its plant and business in Springfield, Ohio, found itself after the first World War heavily in debt. Consequently, in 1921, a bond issue of $100,000.00 secured by mortgage upon all its plant and property was authorized and $90,000.00 of the bonds were issued. In 1923 the interest on the bonds was in default.

It was apparent the bondholders might take steps to take over the property but to prevent this and keep alive the last lingering hope for the stockholders, control of the Company was put in the hands of the bondholders acting through Voting Trustees and the policy of the Company, according to the terms of the Agreement, (R. 76-80), was to be directed by the bondholders. This was an entirely natural and reasonable arrangement and was acted upon continuously without objection until the present controversy arose in 1942. At about the same time a Bondholders' Protective Agreement, (R. 80), was made and a committee was constituted in whose hands all of the bonds were deposited except $300.00 of same. (This $300.00 of bonds disappeared and evidently were lost for no claim has been made on them, and by decree of the Court in the foreclosure suit they were held barred by the statute of limitations.) Under that management the Company managed to keep alive, with interest on the bonds always long overdue. It was at one time the plan of the Bondholders' Protective Agreement to make some readjustment of the bonded indebtedness, but that was never carried out for reasons that do not appear and are, of course, not important here. Especially during the depression did the Company have financial difficulties but the bondholders through their representatives kept it alive with a faint hope on the part of some of those interested that it might at some time pay out. When more work for machine tool parts (which this Company was producing) became active during the present war the Company's business improved and it operated at a profit. However, the interest on the bonds was largely in arrears and it was apparent to those interested for the bondholders that the bonds would not be paid in full, and it also became apparent that the time had arrived to dispose of the plant and busi-

ness since none of the interested parties was actively engaged in operation of the plant and they resided at a distance from Springfield, Ohio, where the plant was located, most of them in the vicinity of Chicago.

At this time James G. Gurney, a member of the Board of Directors, although not a bondholder or representing bondholders, advocated a great expansion, going into debt for machinery and equipment with the idea of greatly expanding the business of the Company, his plan including his control of the Company and getting 10 per cent commission on sales, (R. 30), and the employment of Harlan T. Hyde, (R. 32), another stockholder. This plan did not appeal to the other directors. They had kept the Company out of debt, except the bonded indebtedness, and to accumulate debts that would be prior to the bonds they believed would be hazardous. As a result of these demands and threats by Gurney and his attorney a suit was brought by the Trustee for the bondholders in the Court of Common Pleas of Clark County, Ohio, July 9, 1942, for foreclosure of the mortgage and a receiver was appointed July 15, 1942, to have charge of the property and operate the business, since which time the receiver has actively operated the business. On account of this proceeding for reorganization no sale of the property has been made.

Complaint was made of the bringing of the foreclosure suit and of entering the decree, especially that the judgment was entered for interest at the rate specified in the mortgage, 8 per cent. It was complained that the Company should have made defense as to the rate of interest. That there was no haste or advantage taken of the stockholders in the foreclosure suit is shown by the fact that Mr. Gurney and his attorney were notified of the filing of the suit the day after it was filed and shown a copy of the Petition in that case. (R. 21). Shortly thereafter Mr.

Gurney was represented at Springfield, Ohio, by an attorney, John M. Cole, (R. 32), who was constantly informed of proceedings and contemplated proceedings in the case, including repeated notice that the Plaintiff would ask for a judgment and decree by default. (R. 38-9). Accordingly, after definite notice (R. 38-9) the Plaintiff applied for a decree in foreclosure and it was rendered December 8, 1942. (R. 59) No steps were taken by Gurney in the suit until after final judgment when a motion to set aside the judgment was made, which motion was overruled after the judgment in the District Court.

In the present proceeding Mr. Gurney claimed that the interest on the bonds should be 4 per cent. It was at one time contemplated that the interest be reduced to 6½ per cent, (Bondholders' Protective Agreement, R-82-3), and at another time there was a plan to reduce it to 4 per cent (R. 68), but there was no evidence that either plan was consummated. Gurney in his Petition, (R. 2), stated that after the payment of interest to November 1, 1929, the Committee agreed to accept interest at 4 per cent per annum but in the Affidavit filed with the Petition for reorganization, (R. 8), he said that the Bondholders' Committee agreed on or prior to July 20, 1923, to cause a refunding of the bond issue at 4 per cent but failed to do so. (As a matter of fact the payment of interest to November 1, 1929, was made long after that date, as all the interest payments were made after long overdue. (R. 46, 49).

There is no testimony of any agreement made to reduce the interest and the only scraps of testimony as to rate of interest are (1) a letter from E. J. Price to Judge Oxford at Lakeland, Florida, (R. 68), (who at that time represented Harlan T. Hyde), in which Mr. Price referred to "the plan of the Committee to reduce the unpaid interest rate to four per cent", and (2) the statement of E. J. Price, testi-

fied to by Mr. Gurney, (R. 31), that it had been agreed that the interest be reduced to 4 per cent but Mr. Price added that they did not have even enough money to pay that much. The fact is that the Committee accepted interest for a time at 6½ per cent and for another time at 6 per cent, (R. 2), thus negativing any agreement at 4 per cent.

Complaint was made that there was not a legal election of directors at the stockholders' meetings of 1941 and 1942 because (1) there was no quorum of three-fifths of the stockholders, and (2) one or two stockholders were not notified of the meetings. There was not the quorum required by the articles of incorporation at these meetings by reason of Gurney staying away, thus breaking the quorum. The stockholder not notified of the 1941 meeting was Mr. Gurney's mother, whom he had been regularly representing at former meetings and it was assumed that he would represent her at these meetings. The stockholders not notified of the 1942 meeting were Harlan T. Hyde and Gurney's mother. There is no claim that James G. Gurney and his father, James Gurney, Jr., were not notified. These irregularities in these meetings were not material for the control of the Company was in no way changed. The complaining stockholders were promptly notified of the holding and action of these meetings. (See letters, R. 74, 69, 74-5). If the 1940 board, by reason of failure to elect in 1941 and 1942, continued to be the legal board the same persons would have been in control, that is, the ones chosen by the representatives of the bondholders in accordance with the stockholders' agreement. But the boards chosen by the 1941 and 1942 meetings were de facto boards, recognized by everyone until this controversy arose and particularly by James G. Gurney in attending and participating in at least one meeting after a supposed invalid election. (R. 32, 48-9).

Complaint was made that the voting trust agreement was not terminated. Whether this should have been terminated is not material here. It plainly was to continue "pending the payment of said bonds", (R. 77), but the voting trust was not terminated and no attempt was made to terminate it by legal action.

It sufficiently characterizes the charges of this stockholder to point out that in his Affidavit, (R. 7-8), he charges that the directors caused the corporation to pay the Bondholders' Committee $16,000.00 on June 16, 1942, "and have not accounted therefor", while in the Petition, (R. 2), he alleges that the corporation paid the $16,000.00 on June 16, 1942, to the Bondholders' Committee "to be applied upon the indebtedness evidenced by the bonds." There was of course nothing wrongful in thus making a partial payment on an overdue debt.

IV

Specification of Errors

The Circuit Court of Appeals erred in holding:

(a) That a stockholder has the right under Chapter X of the Bankruptcy Act to file a petition for reorganization of the corporation.

(b) That there was misconduct or wrongdoing on the part of the directors which authorized a stockholder to file a petition under Chapter X.

(c) That the corporation should have filed a petition for reorganization.

(d) That the corporation should have made defense in the suit for foreclosure.

(e) That the corporation was not insolvent.

V.

Argument

(a) Stockholder has No Authority to File Petition Under Chapter X.

The section that governs the filing of a petition under Chapter X of the Bankruptcy Act is Section 126 of that Chapter (U. S. C. Title 11, Section 526) which provides:

> "A corporation, or three or more creditors who have claims against the corporation or its property amounting in the aggregate to $5000.00 or over, liquidated as to amount and not contingent as to liability, or an indenture trustee where the securities outstanding under the indenture are liquidated as to amount and not contingent as to liability, may, if no other petition by or against such corporation is pending under this chapter, file a petition under this chapter."

As if to make it clear, Section 106 of Chapter X (U. S. C. Title 11, Section 506) provides:

> "For the purpose of this chapter, unless inconsistent with the context—
>
> (1) 'claims' shall include all claims of whatever character against a debtor or its property, *except stock*, whether or not such claims are provable under Section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent;
>
> . . . . . .
>
> (4) 'creditor' shall mean the holder of any claim;
>
> . . . . . .
>
> (9) 'petition' shall mean a petition filed under this chapter by a debtor, creditors, or indenture

trustee proposing that a plan of reorganization be effected;

. . . . . .

In the following cases stockholders attempted to file petitions under Chapter X on the theory that they should be considered creditors, and in each it was held that stockholders did not come within the statute above quoted as having a right to file a petition.

Bryan v. *Welch*, 74 Fed. 2nd, 964, syl. 4, (10 C. C. A.) certiorari denied 295 U. S. 748;
In re Picadilly Realty Co., 78 Fed. 2nd, 257, syl. 2, 3, 260-1 (7 C. C. A.);
In re Pittsburgh Terminal Coal Corp., 30 Fed. Sup. 106; affirmed 3rd C. C. A., 109 Fed. 2nd, 1020, on opinion of court below;
In re Phoenix Hotel Co., 13 Fed. Sup. 229, syl. 4, affirmed (6 C. C. A.) 83 Fed. 2nd 724;
In re Arcadia Furniture Co., 12 Fed. Sup. 477.

"As a stockholder of the bankrupt, appellant William H. Neblett was not and could not have been aggrieved by the order appealed from. As such stockholder, therefore, he has no interest or standing to prosecute this appeal."

In re Newport Corp., 98 Fed. 2nd, (9 C. C. A.) 453, 455-6.

(The above case is in point upon the motion of Appellees to dismiss the appeal in the Circuit Court of Appeals.)

Board of Directors Must Act to Authorize Such Petition
~~**Voting Trust is Valid**~~

Action by board of directors is necessary to authorize filing of petition by corporation under Chapter X.

10 *Remington on Bankruptcy*, (5th Ed.), Section 4434, p. 330.
White v. *Penelas Min. Co.*, 105 Fed. 2nd 726, syl. 2.

It is certainly not necessary to cite authorities that only directors can determine as to the action of a company when there is any reason for question or doubt, that is, when it is a matter of judgment as to what is best to do or when it is a matter of policy. That question as to the right and power of directors is settled in case of *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531, which involved an Ohio corporation. This decision is directly to the effect that directors are chosen by the stockholders to act for them, that the corporation acts through them and the stockholders cannot intervene in the affairs of the corporation.

> "The majority are participants in a corporate enterprise. In entrusting their capital to the corporation, they accept the disadvantages of the corporate system along with its advantages. What is claimed to be a disadvantage here is a necessary concomitant of the system and its most distinct attribute—representation of the collective interest of shareholders by selected corporate management."
>
> 311 U. S. 536-7.

Counsel for respondent now admit that the statute does not provide for stockholders to file a petition, but assert the right of the stockholder to file the petition for other reasons, (which we will consider later). However, since the decision of the Circuit Court of Appeals is based apparently upon the theory that the stockholder can file the petition if the Court thinks the corporation should have

done so, the effect of this decision is that a stockholder may file the petition whenever the court thinks a petition should have been filed. Thus the statute would be disregarded. This not only usurps the province of the directors but gives a stockholder a right that the statute withholds — clearly judicial legislation. The Opinion argues stockholders should have the right to initiate a reorganization. This should be addressed to the legislative branch of the government.

The Opinion of the Circuit Court of Appeals recites at length that this dissatisfied stockholder alleged in the Petition or in his affidavit certain things claimed to indicate wrongdoing on the part of the directors. The record shows that no wrongdoing was proved and the Opinion nowhere refers to testimony to support the charges. Charging misconduct without proving it is hardly sufficient to entitle one or more stockholders to supplant the directors in the management and direction of the affairs of the corporation. The last words of the Opinion indicate that the majority had considered the "facts", but what facts are considered as proven does not appear. The District Court, the trial court, found no such proof, (R. 95). Thus we are entirely in the dark as to what, if any, factual ground was the basis of the decision of the Circuit Court of Appeals.

(It is worthy of note that the Opinion was amended after announcement by striking out some obviously mistaken statements, (R. 135), to which attention was called in the Petition for Rehearing. (R. 126-7). A further misstatement of fact in the Opinion, (R. 116), was the statement that Gurney had alleged that the board notified the stockholders that no action would be taken to initiate the reorganization proceeding. No such statement or claim was made by Gurney and no

testimony was offered to that effect. The same is true of the statement in the majority Opinion, (R. 114), that Gurney had alleged that Enoch J. Price for the purpose of misleading Harlan T. Hyde stated in a letter to Hyde that it would be unnecessary for him to attend a stockholders' meeting. No such statement is in Gurney's affidavit and no proof to that effect was offered, the fact being that the letter was written by Mrs. Wheeler and no direction from Mr. Price was shown.)

(b) No Misconduct Authorizing Stockholder to File Petition.

Notwithstanding the plain words of the statute and the clear decisions above cited, counsel claim that this stockholder became entitled to act for the corporation because of default or neglect of the corporation. They seek to invoke the well established rule that where there is fraud or misconduct on the part of officers or directors in failing to take action that should be taken, the stockholders may, under certain conditions, bring suits or make defense that the corporation should have brought or made.

It is held in *Hawes* v. *Oakland*, 104 U. S. 450, syl. 1, 460, that the stockholder can act only where (1) there was some action or threatened action of the directors beyond their authority, or (2) there was such a fraudulent transaction completed or threatened by the directors as would result in serious injury to the company or stockholders, or (3) that the directors were acting in their own interests destructive of the rights of the stockholders, or (4) that the majority of stockholders were oppressively and illegally pursuing in the name of the company a course in violation of the rights of the other stockholders. It is also held that the plaintiff must make it appear that he had made an earnest effort to obtain redress at the hands of the directors.

Rule 23(b) of Rules of Civil Procedure and Rule 27 of Equity Rules lay down practically the same rules.

In the first place there is a failure to show that this stockholder made "earnest effort" to obtain redress. The only thing done was to hand an undated paper, (R. 75), to Mrs. Wheeler, Manager of the Company on January 6, 1943, demanding that the Company file a petition under Chapter X, saying that upon failure to advise the attorneys of the stockholders within three days of willingness to "forthwith" file such proceeding stockholders would take such steps as they deemed necessary and advisable for the institution of such proceeding. No one but the Board of Directors could pass upon the question and obviously there was no time for a meeting of the Board between Wednesday, January 6th, and Monday, the 11th, (when the petition was filed), especially considering that three members of the Board lived in Chicago or vicinity. Rule 23(b) of Rules of Civil Procedure provides that efforts of shareholders to secure action by directors be set forth.

There was really no claim of wrongful conduct but Mr. Gurney thought that the business should have been expanded, production engineers employed and machinery bought. (Par. 12 of Gurney's "Petition for Reorganization", R. 4. Gurney's Affidavit, R. 8. Gurney's testimony, R. 29-30.) The directors disagreed with Gurney. This, of course, was a matter of business judgment. Whether it would be profitable in the end for this small Company to go into debt to expand its plant and facilities for manufacturing was a doubtful question. It was and is common knowledge that it would have been, at the time this controversy arose, probably impossible to procure new machine tools and, if procured, they would have been at a very

high cost. Labor could not have been secured, especially the skilled labor required by this Company in the production of its precision products. How long the emergency would last no one knew and whether enough profit would be made to pay for the outlay for extension of the plant and business was entirely problematical. The chances were that the same thing would happen to this Company that happened to it at the close of the First World War, (when the Hydes and Gurneys were in control), that is, they evidently thought they were making large profits and bought machinery and equipment which was not needed when the War ended. (R. 65-7, 32). This left the Company in such shape that they were required to make the bond issue in question, in doing which they managed to get investors, mostly in the vicinity of Chicago, to put in their money. Now, these bondholders who risked so much and have sacrificed so much during twenty years are entitled to use their judgment in managing the Company instead of the judgment of stockholders who have only a very remote and speculative chance of ever getting anything from this Company.

Conduct that is considered inconsistent in situations of this sort must be something wrongful and deceptive. Here there was nothing wrongful in the inception or continuance of the relation which was created by the stockholders, including those who are now said to be complaining.

It was of course expected that the bondholders would run the business of the Company in their interest, if there was any divergence of interest. As a matter of fact there has been no divergence of interest, although there has been a difference of opinion as to the proper business course to pursue. The Court was called upon to determine as to business judgment in the affairs of the Company and asked to determine that the conduct of the Di-

rectors has been not only unwise but fraudulent. The important fact is that the bondholders, although they had been given full power and opportunity to do otherwise, held up and nursed along this sick corporation over a period of twenty years until the War gave a chance to make profits, thus keeping it intact so that if the stockholders thought it worth while they could redeem the property. That the bondholders did not choose to put this concern in further and overwhelming debt is hardly reason to believe that they were acting fraudulently or in bad faith.

To illustrate the good faith of the Directors and Committee: After the Company had begun to make a little money, instead of using it to pay overdue bond interest, upwards of $3,000.00 was used to buy bonds from discouraged bondholders, some as low as 10 cents and never exceeding 25 cents on the dollar, (R. 2, 7, 32). These bonds were canceled and thus the Company's bonded debt was reduced $16,600.00, which was distinctly for the benefit of the stockholders since it increased the possibility of their equity having some value. That money might have been paid to the Committee as interest on the bonds and the Committee could have purchased the bonds and held them, principal and interest, against the Company and its property.

Voting Trust is Valid.

A voting trust agreement giving the control of the company to bondholders in order to make the loan more secure and vest the management in hands satisfactory to the lenders, and for a term commensurate with the loan, is valid.

14 *Cor. Jur.*, 918, n. 9;
Warren v. *Pim.*, 66 N. J. Equity 353, 408;

The right to end the voting trust (entered into to give bondholders the control), is disputed by the trustees on behalf of the bondholders. This is not the place to consider that question. The facts involved have not been developed and submitted to the Court. The parties have allowed twenty years to pass without challenging the Voting Trust and we submit it cannot be considered and passed upon in this collateral way. The dissenting opinion of Judge Hicks makes this point clear. (R. 124).

As to Claim that Directors were Illegally Elected.

It appears that for many years James G. Gurney was representing his mother and father in the matter of this corporation and the minutes of earlier annual meetings show that he appeared for his mother. At the 1941 meeting he did not appear and therefore the record is silent as to notice to Stella Gurney. It is apparent that this is a very immaterial and harmless technical objection. It does not affect the fact that the five directors declared elected at that meeting became and acted as de facto directors. The situation at the 1942 annual meeting was similar. The same directors were declared elected and acted as such. After the 1941 meeting James G. Gurney attended a Directors' meeting on September 6, 1941, and took part in the meeting as admitted by him, (R. 12, 49). There is no claim that James G. Gurney and his father, James Gurney, Jr., were not notified of both annual meetings and the Secretary evidently assumed that the former would continue to act for his mother.

There was no secrecy as to these meetings. As we have shown above, the complaining stockholders were promptly notified of the holding and action of these meetings.

An irregularity, such as that no notice of stockholders'

meeting was given, cannot be questioned by one who knew the fact and acquiesced.

Clarke v. *Thomas*, 34 O. S. 46, syl. 3.

Since James G. Gurney knew of these meetings and the action taken thereat, it can be assumed that the father and mother for whom the son had been acting, also knew and acquiesced therein.

As to De Facto Directors.

It is well settled, (in Ohio at least), that persons who assume the duties of directors of a corporation and act as such under color of title are de facto directors and their acts are valid until their authority is directly attacked.

> "De Facto directors, generally speaking, are directors who lack the proper qualifications for office or who have been illegally elected but who hold office under color of an election; and, under the de facto doctrine, the acts of such directors within the scope of the authority of de jure directors are binding upon the corporation."
>
> 1 Davis Ohio Corp. Law, p. 790, par. 10;
> *Ehrman* v. *Union Central Life Ins. Co.*, 35 O. S. (324), 339;
> *Clarke* v. *Thomas*, 34 O. S. 46, 58;
> *First Pres. Society* v. *First Pres. Society*, 25 O. S. (128), 133;
> *First Pres. Society* v. *Rogers*, 12 O. S. 248, 251.

Where trustees of a corporation were elected without the required notice being given, this was considered an "irregularity," but those elected became de facto trustees and "the informality could only have been taken advantage of by those having a better right (if there were such), during the current year for which they were elected."

First Pres. Society v. *First Pres. Society*, 25 O. S. (128), 133.

The title of trustees de facto of a corporation cannot be impeached collaterally,—can only be done in a direct proceeding by quo warranto.

First Pres. Society v. *Rogers*, 12 O. S. 248. 251.

Rate of Interest.

It is claimed that the rate of interest upon the bonds should be 4 per cent. The facts as to the interest have been given above. This should not be dignified as a real dispute. We submit that to change the rate stipulated in the Mortgage Deed of Trust and in the bonds some definite and positive written testimony is required.

Furthermore, any agreement to change the terms of the mortgage and bonds would be invalid unless upon adequate consideration. No consideration is alleged.

Such agreement is negatived by the fact that the Committee had no power under the Bondholders' Protective Agreement to make such change in the rate of interest. That Agreement (Exhibit No. 18, par. (18) R. 82), only authorized a lowering of the rate of interest to 6½ per cent and that only upon a refunding of the bond issue. That refunding never occurred and hence there was no authority in the Committee to change the interest rate.

Who can say that the 8 per cent interest was not required in order to sell the bonds and compensate the purchasers for the risk incurred?

The letters of E. J. Price (R. 65. 68), outlining freely and without reserve the whole picture of the careful preservation of this industrial invalid through the depression by the sincere efforts of the members of the Committee without assistance from those who now pretend to claim misconduct amounting to fraud and the contrasting pic-

ture of the grasping cupidity of this stockholder in seeking to gain an advantage over men from whom he has received honorable and generous treatment for almost twenty years show the real situation.

But if we should concede that there is a genuine dispute about the rate of interest we fail to see why that justifies saying that the Directors have acted in an inconsistent and fraudulent manner.

Rate of Interest Adjudicated.

We do not need to argue to this Court that a judgment of a state court has complete finality and that the federal courts recognize adjudications in state courts.

10 *Remington on Bankruptcy*, Sec. 4673.

In the foreclosure suit the amount due upon the mortgage was determined and a judgment rendered for the amount due. (R. 59). That adjudication cannot be disregarded or set aside unless directly attacked for fraud. No claim of fraud is made and could not be made in a collateral proceeding.

Adjudication by a state court in a prior proceeding is binding upon a bankruptcy court as to issues there determined.

In re Wickwire Spencer Steel Co., 12 Fed. Sup. 528, syl. 3;
10 *Remington on Bankruptcy* (5th Ed.) Sec. 4673.

There was a time and an opportunity to make this question. The petition in the foreclosure case claimed interest at 8 per cent and as we have seen, Gurney and his attor-

neys had notice of all the proceedings had and contemplated for five months prior to the judgment and during that time took no steps therein.

Laches of Complaining Stockholder.

As to the complaints and objections mentioned, there is the complete answer that these complaining parties had for a long time full knowledge of the facts and full opportunity to have obtained complete redress, if they were entitled to any redress, by direct proceedings.

In this collateral way they cannot complain and raise questions that should long ago have been raised directly, if ever raised. The laches of the stockholder began and continued for many years before the foreclosure proceeding. Now, suddenly to ask a Bankruptcy Court to determine and decree that a voting trust should be terminated, that directors were illegally elected and that a rate of interest should be changed—though adjudicated after ample notice—is contrary to orderly and proper procedure, as well as violative of the rights of the interested parties.

The dissenting opinion of Judge Hicks aptly summarizes this point. (R. 124).

(c) The Corporation had no Duty to File a Petition for Reorganization.

A derivative suit, that is, one to require some action to be taken on the part of the corporation that it should take, is merely one to take action that it is bound in law and duty to take. The thing here sought to be done is to reorganize a corporation.

The fourth proposition of the syllabus (as published in 142 Fed. 2nd, 404), with that part of the Opinion that sup-

ported it, (R. 118-9), is equivalent to holding that filing a petition to reorganize is a legal duty on the part of the company acting through its board of directors. But suppose the directors believe it unwise to reorganize or that there is no necessity therefor. Have they no discretion in the matter? Are they under a legal duty to file the petition if some stockholder thinks a reorganization should be had? There certainly is a discretion lodged somewhere to determine that question. Is it to be determined by a stockholder and not by the directors?

That entering into a reorganization is a matter of business judgment on the part of the directors is held in

In re South State St. Bld. Corp., (7th Cir.) 140 Fed. 2nd 363, syl. 1.

(d) Was the Corporation Guilty of Wrongful Conduct in not Making Defense in the Foreclosure Suit?

The majority opinion below seems to assume, (R. 121, 142 Fed. 2nd. 405, syl. 12), that there was a defense to the foreclosure suit which the corporation wrongfully failed to assert. The record shows no defense and none has been claimed, except that the interest rate on the bonds should have been lower than that contracted for in the bonds and mortgage. We have seen that the question of interest does not rate as a real dispute. There was talk at times in the past as to lower interest, (R. 31, 68), but the change was never made, although less than the stipulated rate was accepted for a time, first at one rate, then at another.

The statement is made in the opinion that Gurney for himself and others attempted to intervene in the foreclosure suit in the state court. (R. 113-4). This is incorrect. Although represented by an attorney on the ground,

(Mr. John M. Cole), with full knowledge for five months of the pendency and proceedings in that suit, no intervention and no demand on the corporation to defend was made. (R. 38-9). It is true that after the judgment and decree in that suit a motion was filed by Gurney to set aside the judgment, which motion was pending at the time of the hearing in the District Court. It is perhaps fair to say that since that hearing the motion was overruled in the Common Pleas Court of Clark County, Ohio, and no appeal therefrom, which does not appear in the record here.

Since this stockholder failed to act by intervening to defend or causing the corporation to defend after long opportunity to do so, it is too late to predicate a reorganization proceeding upon the supposed partial defense not made.

(e) The Corporation was not Solvent and Hence the Stockholder had no Interest in Reorganization.

It is of course well settled that where the corporation has not assets sufficient to pay its debts, the stockholders are not entitled to participate in a reorganization proceeding.

The only evidence below on this subject was the financial statements offered by Gurney, (R. 84-6), that the assets were not worth the liabilities by $51,608.08. The attempt to overcome this in part by claiming that too much interest had been charged, in the absence of evidence to support that claim, is not sufficient.

The operating statement, (R. 86-8), shows comparatively large operating profits for 1942 but the excess profits and other taxes are so large that only a small fraction of overdue interest could be paid from the net profit.

One very significant indication of insolvency is that bondholders were willing to sell their bonds at much less than par, although there was considerable overdue interest. Gurney testified, (R. 32), that he knew the Company had purchased bonds from bondholders at different times at 10, 15 or 20 cents on the dollar and as late as September, 1941, (R. 49), the directors took action authorizing the purchase of bonds, (Certificates of Deposit), at not more than 25 cents on the dollar. (At this meeting Gurney was present and he voted for such purchases, R. 32.) It is hardly possible that the war activity would so increase values as to make the assets of the Company worth the bonds and accumulated interest. It is common knowledge that at one stage such plants would have sold at inflated war prices but the sale has been delayed and the day for selling at such prices has gone by.

> "As some of the bondholders point out, the bulge of war earnings per se is unreliable for use as a norm unless history is to be ignored; and numerous other considerations, present here as in former periods, make them suspect as a standard for any reasonably likely future normal year. Among these are the great increase in taxes and in certain costs of operation and the decrease in water and truck competition."
>
> *Institutional Investors* v. *C. M. St. P. & P. R. R.*, 318 U. S. 523, 543-4.

(f) No Reasonable Expectation that a Plan of Reorganization can be Effected.

It is of course obvious that no reorganization can be effected with all of the creditors opposed to it. The statute, (Ch. X. Section 179, U. S. C. Section 579), provides that two-thirds of each class of creditors must consent to a plan.

The only debts here, (except current taxes), are the bonds, all of which have been deposited with and transferred to the Bondholders' Protective Committee. It is plain that the holders of the bonds will be opposed to a reorganization proceeding in a Bankruptcy Court involving an expensive, delaying procedure, when their rights can be worked out in the pending foreclosure case.

The Committee now in fact owns the bonds and are opposing this proceeding. That Committee has the right to represent all the bonds unless the Court determines otherwise, but until the Court so determines the Committee has power to act.

In re Witherbee Corp., 88 Fed. 2nd 251, 255-6.
(Cert denied 301 U.S. 710; Rehearing denied 301 U.S. 71[illegible]

The court must be "satisfied" of good faith in filing the petition (Section 141). This means that the burden of satisfying the judge of the good faith is on the petitioner.

> 10 Remington on Bankruptcy (5th Ed.), Section 4457, p. 347, citing *In re Phila. Rapid Transit Co.*, 8 Fed. Sup. 51, syl. 2, affirmed 73 Fed. 2nd, 1022.

"Good faith" includes reasonable expectation that a plan can be effected. (Section 146(3)).

Petitioner has burden of proof of establishing good faith. *Manati Sugar Co.* v. *Mock*, 75 Fed. 2nd 284, syl. 2, 285.

The fact is there can be no difference of opinion. The bondholders, having held these bonds for over 22 years with little hope of realizing upon them, naturally will not join in any plan to modify their position. Any modification would be a relinquishment of an advantage in their present secured position. If any reasonable plan can be suggested, it can be worked out directly with the rep-

resentative of the bondholders, since, in order to be effective, it must be satisfactory to them, and hence no proceeding under Chapter X is necessary or called for. This situation shows the character of and motive behind the present proceeding. No plan has been suggested and counsel evidently do not want to meet this question by suggesting one.

Therefore, regardless of the immateriality of the charges of alleged wrongdoing and of the failure to prove same, this proceeding should not have been ordered sent back to the District Court to begin hearings and protracted proceedings when it is apparent no reorganization can be had.

Petition under Chapter X was dismissed as not filed in good faith because unreasonable to expect a plan of reorganization could be effected.

> *Fidelity Assurance Assn.* v. *Sims*, 318 U. S. 608.

A proposed reorganization must be the result of a reasonable plan which has reasonable prospects for success.

> *Tenn. Pub. Co.* v. *Am. Nat. Bank*, (6 C. C. A.) 81 Fed. 2nd. 463, Affirmed 299 U. S. 18.

A petition under Chapter X must show not only need for reorganization but also basis for expecting that reorganization can be effected.

> *Manati Sugar Co.* v. *Mock*, (2 C. C. A.) 75 Fed. 2nd, 284, syl. 3.

> "Where the object is reorganization, rather than liquidation, the petitioner should furnish some assurance, by pleading at least, that they reasonably expect a fairly general support for their proposed plan or promised plan. Other-

wise there would be little to be expected in the undertaking of assuming responsibility for a reorganization."

75 Fed. 2nd, 285.

"It does not appear that the petitioning debtor has any equity in the property, or that there is any reasonable probability that a successful reorganization can be had, or that anything can be accomplished by interfering with the rights of the holders of the mortgage or mortgage certificates to sell the property. *Manati Sugar Co.* v. *Mock*, (C. C. A.) 75 Fed. 2d. 284."

In re Francfair, Inc., 13 Fed. Sup. (513) 514.

Where a corporation had for years been engaged in losing financial struggle, had accumulated debts and been unable to raise needed capital, it was unreasonable to expect that reorganization could be effected.

Seaboard Terminals v. *West. Md. Ry.*, 108 Fed. 2nd 911, syl 13.

In re Reliable Estates, Inc., 33 Fed. Sup. 588, 589, is quite similar to the present case where it was held unreasonable to expect a plan to be effected.

(g) No Right to Displace or Modify Liens.

The right of creditors, particularly bondholders, to absolute priority over stockholders in a reorganization is clearly recognized and accrued interest on bonds has the same priority.

Con. Rock Prod. Co. v. *DuBois*, 312 U. S., 510, syl. 15-20.

Sec. & Ex. Com. v. *U. S. Realty Co.*, 310 U. S. 435, syl. 3, 4.

Marine Harbor Properties v. *Mfrs. Trust Co.*, 317 U. S. 78, syl. 5, 87 L. Ed. 73.

That no plan of reorganization is "fair and equitable" where the interests of stockholders are secured at the expense of creditors is settled in—

Case v. *Los Angeles Lumber Co.*, 308 U. S. 106.

(h) PRIOR PENDING PROCEEDING WILL BEST SUBSERVE INTERESTED PARTIES.

Section 146 of Chapter X (11 U. S. C. Section 546), paragraph (4), provides that a petition will not be deemed filed in good faith if a prior proceeding is pending in any court and it appears that the interests of creditors and stockholders would be best subserved in such proceeding.

This provision of the statute was under consideration by this Court in a recent case and it was there held that when there is such prior pending proceeding it must appear, in order to justify petition for reorganization, that at least in some *substantial particular* the prior proceeding withholds or denies to creditors or stockholders benefits, advantages or protection which the bankruptcy act affords. It is specifically there held that it must be shown that interests of creditors and stockholders would be better subserved by a proceeding under the bankruptcy act than by a mortgage foreclosure.

Marine Harbor Properties v. *Manufacturers Trust Co.*, 317 U. S. 78, syl. 2, 4, 83-4.

See also *Fidelity Assurance Assn.* v. *Sims*, 318 U. S. 608, 619.

Where a prior proceeding is pending in a state court it must be proved that interests of creditors and stockholders would not be best served in state proceeding.

In re 325 *E.* 72*nd St.*, 53 Fed. Sup. 997, syl. 2.
In Re Reliable Estates, 33 Fed. Sup. 588.

It is conceded by the Court below that the party filing the petition while a prior proceeding is pending in a state court has the burden of showing that the interests of creditors and stockholders would be best served by a reorganization in bankruptcy. (R. 123, Syl. 17, 142 Fed. 2nd 405). Nowhere was such showing made in this case.

After reciting the allegations of the Petition and Affidavit and holding that the stockholder could file the Petition, the majority opinion, (R. 123) points out that a petition for corporate reorganization should be dismissed if it is unreasonable to expect that a reorganization can be effected or if a prior pending proceeding would best subserve the interests of the parties and further that the party filing the petition has the burden of showing that their interest would be best served by a reorganization in bankruptcy.

Recognizing that correct statement of the law there was nothing for the District Court to do but dismiss the petition, which action should now be affirmed, unless this Court is of the opinion that the Court of Appeals should have dismissed the appeal as asked for by appellees.

We call attention to the clear and concise dissenting opinion of Judge Hicks holding that Chapter X does not contemplate or provide for the proceeding below. We note that Judge Hicks holds that "the appeal should be dismissed". (R. 124)

The opinion of Judge Nevin of the District Court (R. 90), included a complete review of the case and an appropriate finding upon the facts and law.

The observation of Chief Justice Hughes in *Tenn. Pub. Co.* v. *Am. Nat. Bank*, 299 U. S. 22, is here very apt to the

effect that "the District Court is not bound to clog its docket with visionary or impractical schemes for reorganization."

We submit that the petition for certiorari should be granted and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

WM. W. KEIFER,
HORACE S. KEIFER,
GEORGE W. TEHAN,
Counsel for Petitioners.

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Supreme Court of the United States

October Term, 1944

No. 410

In the Matter of Proposed Reorganization of THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation,
Debtor,

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and ROY MASSENA, E. J. PRICE, W. D. HOLLISTER and W. T. KETTERING, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.,
Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co., and THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WM. W. KEIFER,
HORACE S. KEIFER,
GEORGE W. TEHAN,
512 M & M Building,
Springfield, Ohio,
Counsel for Petitioners.

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We note that counsel charge (in the first sentence of their Brief), that the Petition is replete with misstatements and a promise is made to point them out some other time. We suggest that in their reasonably long Brief some of these might have been pointed out.

Since filing our main Brief we have seen a very recent case to which we should call attention:

John Hancock Mutual Life Ins. Co. v. *Casey,* 141 Fed. 2nd 104, (October, 1943), is a case somewhat similar to the present one. There the mortgagee, "as the holder of the first mortgage and by itself the senior and largest class of creditors, has made it patently clear that it will not accept any plan of reorganization which involves any relinquishment of its rights under the mortgage." (p. 107). It was held that a reorganization was either unnecessary or impossible. In the present case reorganization is impossible or unnecessary since any plan, in order to be approved by the Court, must be acceptable to the mortgagee, and if acceptable no court proceedings are called for.

CRITICISM OF MANAGEMENT

It will be observed that the main point of difference between the parties involved in this matter is as to the management of the business affairs of this Company. Mr. Gurney, who filed the Petition for Reorganization, believed the profits of the Company should be devoted to new equipment, going into new lines of production, instead of paying debts, and also that money be borrowed for the same purpose. Of course money could be borrowed only by securing it prior to the bonds. The other members of the Board of Directors disagreed with Mr. Gurney and decided to run the Company more conservatively, paying upon its debts as they could. We believe a careful observer would agree with the latter, especially considering the results of the last few years, but this is immaterial since the Court will not interfere with the management of the Company unless there is fraud or bad faith.

COMPLAINTS OF NEGLECT AND WRONG-DOING

The directors are repeatedly accused of neglect and wrongful acts. This is usually stated in general terms (p. 8), to the effect that they were seeking to extinguish the stockholders' equity and appropriate the assets for the benefit of the bondholders, but no particular acts of this kind are pointed out, counsel relying upon their complaint that the directors did not borrow money, reequip, enter into new lines, etc. The directors are repeatedly accused of neglect and wrongful act in not seeking a reorganization, (10, 12, 14, 16). We have already (main Brief 24), pointed out that the corporation itself has no legal obligation to file a petition to reorganize. Such action must be the result of the exercise of discretion as to whether it would be wise and whether there is a necessity therefor. It is constantly assumed by counsel that a proceeding for reorganization would be of great benefit to the corporation and stockholders. How that would be is not pointed out. In fact, a reorganization could be of no benefit to stockholders, unless it changed the rights of the only creditors, the bondholders, which could not be done without their consent, and naturally they would not and do not consent thereto.

Counsel, in attempting to show wrong-doing on the part of the directors, say (p. 17) that the directors caused the corporation to vote to themselves as a Bondholders' Committee $1000.00, as might be requested for expenses. The Record (p. 48) shows that the directors authorized payment to the Bondholders' Committee of not to exceed $1000.00, but with "proper credit to be given in future settlement between the Committee and the Company". Of course it was proper to pay the bondholders and whether

the Committee chose to use it for expenses or not is not material. But the payment was not made, (R. 28), probably because the Committee never called for it.

Complaint is made of payments to attorneys and the Trustee (p. 7), by the Receiver. These payments were made by order of the Court prior to the reorganization proceedings.

The letter of Enoch J. Price, (R. 65-7) written before any controversy arose, is self-explanatory and we commend it to the Court as a full and frank statement of the history and condition of this concern. It gives an unprejudiced picture of the situation confronting the Bondholders' Committee and their earnest and honest efforts to work matters out for the benefit of all concerned. That it is a truthful, friendly statement is apparent on the face of it.

A POSSIBLE METHOD OF REORGANIZATION

If the reorganization included putting in additional capital by or for the stockholders, there might be some prospect of successful reorganization. Any displacement of the lien of the mortgage bondholders in favor of new lenders could only be done with their consent, which could be arranged, if at all, directly with the bondholders and no reorganization proceedings would be needed or appropriate.

It is plainly apparent that no one will contribute capital to rehabilitate this corporation. Evidently the stockholders will not for their only suggestion is that money be borrowed. The bondholders, (after twenty-three years of holding these bonds, all of which are long overdue), will not put in further money. Either borrowing money or using earnings would be a contribution by bondholders. Outside capital could only be obtained, if at all, by securing

it ahead of the bondholders, which would in effect be a contribution by bondholders and likewise taking, for that purpose, earnings of the receivership in the foreclosure proceeding would be an appropriation of funds rightfully belonging, under the terms of the Mortgage Deed of Trust, to the bondholders. All of which would be a hazardous speculation, not to be entered into without the mortgage bondholders' consent.

STATUTE DOES NOT PERMIT STOCKHOLDER TO FILE PETITION

Counsel, while admitting that the statute, Section 126, does not authorize stockholders to file a petition for reorganization, at the same time claim that that section should be deemed to read as if stockholders were entitled to appear for the corporation. (p. 13). This is a clear attempt to read into the statute a provision that is definitely omitted and stamps their whole claim as unsound. The fact that the stockholders are expressly authorized (Secs. 136, 207) to appear in later stages of the proceeding makes it clear that they are not to be included in the section authorizing the filing of the petition.

The curious argument is made (pp. 10, 11) that because the directors did not file a petition for reorganization, stockholders are entitled to do so. How such a result follows is not shown. Nor does it appear why the statute is to be enlarged because the directors do not determine to file the petition.

PREVIOUS RECORD OF CORPORATION

Counsel contend (p. 15) that there is no evidence to support our statement that a program similar to the one

that Gurney now insists upon had been ill-advised and resulted in heavy loss during the First World War. Upon this point we call attention to pages 66 and 32 of the Record. That this bond issue was made in 1921 to pay piled up debts is sufficient to show the failure of the Company to have profited by their conduct of business during the First World War.

LACHES

Counsel seem to feel the charge of laches has importance for they repeatedly profess to answer it by saying that upon the bringing of the foreclosure suit, (which they knew of at the time it was brought), they immediately retained counsel, (pp. 7, 21). Due diligence is not shown by merely employing a lawyer. They had ample knowledge and ample time to raise any question desired in the foreclosure suit and the record shows not a thing was done. A capable attorney was employed but, either because he found no ground for action or was not authorized, he did not act.

The matters complained of occurred or began long years ago, such as the continuance of the Voting Trust and the alleged dispute as to the rate of interest, and no action was taken. The complaint about the Voting Trust came first in 1942, just before the bringing of the foreclosure suit, (Respondent's Brief, pp. 6-7), and interest was ordered paid by the Directors without regard to any agreement to reduce same as late as September, 1941, at a meeting attended and participated in by Mr. Gurney, (R. 49, see also minutes of meeting of March 28, 1941, R. 46.)

The claim is made in this connection that the Voting Trust had terminated. This is not important because the same directors continued in charge and the same bond in-

debtedness continued. As was said by Judge Nevin, (but not in the Record), this is not the place to have the question of the termination of the Voting Trust litigated.

DUTY OF CORPORATION TO MAKE DEFENSE IN FORECLOSURE SUIT.

Counsel reiterate that the Board of Directors failed to make a defense in the foreclosure suit but they claim no defense of any sort, except as to a part of the interest and after five months' opportunity to make such a question they failed to do so. We submit that the corporation and the complaining stockholders having had opportunity to call that matter in question, it became adjudicated by the judgment in that case.

SOLVENCY OF THE CORPORATION.

Counsel apparently concede the insolvency of the corporation in their statement (p. 28) that there will be a large deficiency in case of the sale of the assets of the Company.

In arguing that the Company is solvent and therefore the stockholders are interested, it is contended that there was no failure of proof of solvency but lack of opportunity to present the same (p. 24). The fact is, as the Record shows (R. 84-89), the petitioner below offered statements of the financial condition of the Company, which showed insolvency. Now, however, counsel contend (p. 24-26), that the Company is solvent based upon what is said to be a balance sheet of December 31, 1943, and income tax return of 1943. None of this, of course, is in the Record for the statements cover periods subsequent to the hearing in the District Court. That ought to be a sufficient answer

to what is stated, but the fact is the only change from the previous statements of condition is that the Receiver made a profit in war work. That work has been declining and probably will in the course of a short time disappear. Then, presumably, the Company will be back in its former hopeless condition.

RIGHT OF BONDHOLDERS' COMMITTEE TO ACT.

Counsel claim, (pp. 26-27), that the Bondholders' Committee has no right to participate in the reorganization proceeding and cite *In re Loeb Apartments*, 89 Fed. 2nd, 461, to the effect that the Committee has no authority to object to the filing of the Petition. This case was under Sec. 77B which provided only for creditors or stockholders to be heard. (See Sec. 77B (c) (11) as that law stood prior to the amendment of August 27, 1935). The present law on that subject is in Section 207 of the Chandler Act, (11 U. S. C., Sec. 607), which permits "a party in interest" to intervene.

Section 209 expressly provides that a creditor may act by a duly authorized committee. The Bondholders' Committee's authority was shown by the Bondholders' Agreement. (R. 80).

CONCLUSION.

We submit that the questions involved here are of sufficient importance for final determination by this Court. The Federal Courts, which have such importance and control of business affairs under the Bankruptcy Act, especially Chapter X, should have guidance in this matter. Business corporations, bondholders and stockholders likewise are

entitled to an interpretation of this Federal statute. As construed by the Circuit Court of Appeals this statute will invite minority stockholders to threaten and interfere with corporations on grounds sufficient to make trouble and cause loss but with no reason for court interference.

Respectfully submitted,

WM. W. KEIFER,
HORACE S. KEIFER,
GEORGE W. TEHAN,
Counsel for Petitioners.

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Supreme Court of the United States

October Term, 1944

No. 410

In the Matter of Proposed Reorganization of THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation,

Debtor,

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and ROY MASSENA, E. J PRICE, W. D. HOLLISTER and W. T. KETTERING, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.,

Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co., and THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation,

Respondents.

REPLY BRIEF ON THE MERITS

WM. W. KEIFER,
HORACE S. KEIFER,
GEORGE W. TEHAN,
512 M & M Building,
Springfield, Ohio,
Counsel for Petitioners.

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Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co., a Corporation,

Respondents.

REPLY BRIEF ON THE MERITS

This is a Reply to the "Brief for Respondent" filed about December 1, 1944.

For Petitioners we asked to have our Brief in support of the Petition for Certiorari stand as our Brief on the Merits. Respondent evidently seeks to have his Answer Brief in opposition to certiorari stand as his Brief on the Merits and

files his latest Brief as a supplement thereto. Our Reply Brief, (filed about October 15, 1944), in support of certiorari is therefore also to be considered on the Merits.

CONTROVERTED STATEMENTS OF FACT

Counsel profess to point out several misstatements in our Statement of the Case.

As to the first matter it is true that the foreclosure suit was brought as a result of Gurney's demands and threats, (as we also stated), but it is also true that it had become apparent that the time had arrived to dispose of the mortgaged property since, as appears in the record, none of the interested parties (the bondholders) was actively engaged the business.

Secondly, counsel deny that Gurney was seeking the control of the Company. The effect of his demands was to control. In Gurney's affidavit (R. 8) he admits having demanded the return from the Voting Trustees of a majority of the stock which of course would give him control.

The third statement claimed to be "wholly unsupported" is that the failure of the quorum at the stockholders' meetings was due to Gurney's absence. The fact is obvious. Mrs. Gurney's (the mother's) shares together with Gurney's own would be sufficient to make a quorum and it is no very great stretch of the imagination to see Gurney acting for his family just as he is now appearing for them.

AS TO FAILURE OF THE CORPORATION TO FILE PETITION FOR REORGANIZATION.

The claim of counsel is based wholly upon the assumption that there was a duty on the part of the corporation to file a

petition under Chapter X. As we have shown, (Brief p. 24), the corporation had no such duty.

But, if there was such a duty, what could have been accomplished by such action? This corporation, out of debt except for what amounted to one creditor, could accomplish nothing by proceeding under Chapter X unless by scaling down or postponing the bond indebtedness, which of course could not be done without the consent of the bondholders, and if there was such consent, no proceeding for reorganization was necessary. Besides, it must have been apparent to the corporation and its directors that the one creditor (or all of the creditors, if considered as separate creditors), would not consent to any such plan.

AS TO THE INTEREST QUESTION BEING ADJUDICATED.

It is claimed that there was no adjudication in the foreclosure suit, (in which judgment was rendered before these proceedings were begun), because the interest "was never in issue or litigated in the state court proceeding." The cases cited are not in point for each only held that the particular matter in question was not involved or determined in the earlier case and therefore was not res judicata. One of the cases, *Cromwell* v. *County of Sac*, 94 U. S. 351, 353, expressly held that where a cause of action is adjudicated, there is an absolute bar as to every defense presented or that might have been presented. Interest was claimed in the foreclosure case in the state court and was necessarily involved and adjudicated when a judgment was rendered for the amount found to be due. It certainly was adjudicated as to the Company and therefore as to the stockholders.

SOLVENCY OF THE COMPANY.

The reference of counsel (R. 67) shows that the bondholders, (or at least those for whom Enoch J. Price, a member of the Bondholders' Committee, spoke), were willing to accept payment "at a heavy discount." This added to the fact that the bondholders were surrendering their bonds at ten to twenty-five cents on the dollar of principal is strong indication that the corporation was not able to pay its debts.

"A POSSIBLE METHOD OF REORGANIZATION"

Under this head counsel contend there is nothing in the record disclosing that additional capital is necessary. It is certain the Company cannot go on without either the use of the mortgaged property (which is the whole of the plant and assets of the Company) or the supplying of additional capital to pay the bonds. It is also perfectly plain that the stockholders will not supply this additional capital or they would have long since settled with the bondholders "at a heavy discount."

Counsel (perhaps unwittingly) settle the whole matter by saying it is possible a new mortgage could be procured to pay the principal and interest of the present mortgage, in which event consent of the bondholders would be unnecessary. That is the point of the whole controversy. Such possibility ought to be promptly explored and if capital could be secured no reorganization would be necessary or called for. If it cannot be secured the non-consent of the bondholders prevents reorganization.

Respectfully submitted,

WM. W. KEIFER,
HORACE S. KEIFER,
GEORGE W. TEHAN,
Counsel for Petitioners.

No. 410

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

IN THE MATTER OF PROPOSED REORGANIZATION OF THE WESTERN TOOL & MANUFACTURING COMPANY, A CORPORATION,
Debtor.

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.,
Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co.,
Respondent.

ANSWER OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. E. FERGUSON,
77 W. Washington Street,
Chicago, Illinois,

CHARLES W. STIEFEL, JR.,
30 N. LaSalle Street,
Chicago, Illinois,

GEORGE R. MURRAY,
Callahan Building,
Dayton, Ohio,
Attorneys for Respondent.

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INDEX

	PAGE
Statement Of The Case	1-4
Argument	5-28
Conclusion	29

Summary of Argument.

The persons operating the Company since 1923 were acting in the capacity of directors, Bondholders' Committee and Voting Trustees of a majority of the shares	5-8
The Company has no valid board of directors which can act for it	9-10
Stockholders have the right to institute and prosecute a proceeding under Chapter X of the Bankruptcy Act when the directors have an adverse interest or there is no valid board of directors	10-13
The misconduct of the directors in the foreclosure action and in this proceeding	15-17
The Voting Trust Agreement has terminated and the stockholders may so treat it	17-18
De facto directors have the same duties to the shareholders as de jure directors	18-20
The agreement to reduce interest on the mortgage debt was valid	20-21
Respondent was not guilty of laches	21-22
Where the directors' judgment as to the need for the reorganization is influenced by antagonistic interests, or where no valid board of directors exists, the stockholders may determine that question	22-23
Directors must assert defenses possessed by the corporation in a foreclosure suit against the corporation, or if there is no defense should seek relief under Chapter X if for the best interests of the corporation	23-24

PAGE

SUMMARY OF ARGUMENT (Continued).

The corporation is solvent and there is an equity for the shareholders 24-26

The plan of reorganization can be effected and the opposition of the petitioners to this proceeding should be disregarded 26-28

This proceeding will best subserve the interests of the interested parties 28

CASES CITED.

Adams Recreation Palace v. Griffith, 12 O. O. 134, 53 Ohio App. 216 20

Bonnell v. Brown, 11 C. C. (N.S.) 58, 80 O.S. 710 ..... 18, 22

Bryan v. Welch, 74 Fed. 2nd. 964 13

Campbell v. Alleghany Corporation, 75 Fed. 2nd 947 11

Clarke v. Thomas, 34 O. S. 46 19

Consolidated Rock Co. v. DuBois, 312 U. S. 510 25

Continental Illinois Natl. Bank v. C.R.I.P.R.R. Co., 294 U. S. 648 ..... 11, 13

Crimp v. Union Bank, 352 Ill. 93 22

Eggers v. National Radio Co., 208 Cal. 308 23

Ehrman v. Union Central Life Ins. Co., 35 O. S. 324 19

First Presbyterian Society v. First Presbyterian Society, 25 O. S. 128 19

First Presbyterian Society v. Rogers, 12 O. S. 248 19

Gholson v. Slavin, 137 O. S. 551 20

Hawes v. Oakland, 104 U. S. 450 ..... 12, 15

In re Arcadia Furniture Co., 12 Fed. Sup. 477 13

In re Beaver Cotton Mills, 275 Fed. 498 12

In re Castle Beach Apts., 113 Fed. 2nd. 762 26

In re Dressler Producing Co., 262 Fed. 257 ..... 12, 22

In re Fidelity Assurance Association, 42 Fed. Supp. 973 ..... 9, 10, 14, 22

In re Julius Roehrs Co., 115 Fed. 2nd. 723 28

PAGE

Cases Cited (Continued).

In re Lehrenkrauss Corp., 10 Fed. Sup. 14 13
In re Loeb Apartments, 89 Fed. 2nd. 461 27
In re Mississippi Valley Utilities Corp., 2 Fed. Supp. 995 ..... 9, 10, 22
In re Newport Corp., 98 Fed. 2nd. 453 13
In re Phoenix Hotel Co., 13 Fed. Supp. 229 13
In re Piccadilly Realty Co., 78 Fed. 2nd. 257 13
In re Pittsburg Terminal Coal Corp., 30 Fed. Supp. 106 13
In re 325 E. 72nd St., 53 Fed. Supp. 997 28
In re 263 W. 38th St. Corp., 37 Fed. Supp. 667 26
In re Witherbee Corp., 88 Fed. 2nd. 251 27
Jensen v. Snow, 131 Me. 415 22
Langworth v. Hunt, 11 O. S. 194 22
Ogden v. Gilt Edge Consolidated Mines Co., 225 Fed. 723 12
Ormsby v. Langworth, 11 O. S. 653 22
Securities Commission v. U. S. Realty Co., 310 U. S. 435 ..... 11, 13
Snyder v. Fenner, 101 Fed. 2nd. 736 28
Voeller v. Neilston Warehouse Co., 311 U. S. 531 14
Warren v. Pim, 66 N. J. Eq. 353 18
White v. Penelas Mining Co., 105 Fed. 2nd. 726 14
Witters v. Ebsarz Co., 95 Fed. 2nd. 746 28

Texts.

Finletter: The Law of Bankruptcy Reorganization, page 555, et seq. 25
Remington on Bankruptcy, secs. 364, 370, 383, 3758, 4588, 1942 Supp. to sec. 4516 (p. 111) 12, 13, 27

Statutes.

Bankruptcy Act, secs. 146, 203, 212, 256; 11 U.S.C.A. 546, 603, 612, 656 ..... 26, 27

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Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co.,

Respondent.

ANSWER OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The Statement of the Case contained in the Petition for Writ of Certiorari is replete with allegations which are either wholly unsupported by the evidence or directly contradicted thereby, all of which will be pointed out in

respondent's Brief if this Honorable Court should direct the issuance of the Writ of Certiorari.

The nature of the proceedings is as follows:

A petition for reorganization under Chapter X of the Bankruptcy Act was filed by the owners of a majority of the outstanding capital stock of The Western Tool and Manufacturing Company, a corporation, on behalf of and in the name of that corporation.

The total number of outstanding shares of the corporation is 1120½, with a par value of $100.00 per share. The respondent stockholders are the owners of 682¾ shares (R. 4, 5, 29).

The only indebtedness of the corporation, at the time petition was filed, (other than current accounts payable and federal income and excess profits taxes for the year 1942) (R. 85) was a first mortgage indebtedness in the principal sum of $73,400 of which $300 in principal amount was outlawed by the statute of limitations (R. 2, 54, 55, 58). All of the outstanding bonds, except those barred by the statute of limitations, were and are on deposit with a Bondholders' Protective Committee (R. 55) under the terms of a Bondholders' Deposit Agreement dated November 1, 1923 (R. 80).

Shortly after default was made by the debtor corporation in the year 1923 in the payment of interest due upon the bonds aforementioned, the Bondholders' Committee was organized and there were transferred to this Committee, or its nominees, a majority of the outstanding shares of the corporation pursuant to the terms of a Voting Trust Agreement (R. 70, 71, 76, 78). The shareholders who filed the petition in the instant proceeding owned, at the time of filing, the number of shares and had on deposit with such Voting Trustees, the number of shares set opposite their respective names as follows (R. 29).

Stockholders	Shares Held	Shares deposited with Voting Trustees
James G. Gurney	7	
Stella Gurney	66	
James Gurney, Jr.		59
Harlan T. Hyde	107¼	443½

Subsequently James Gurney, Jr., died and his death was suggested of record in the Circuit Court of Appeals.

Since the formation of the Bondholders' Committee and the deposit of the majority of the stock with it, that Committee has controlled the Board of Directors of the Corporation (R. 7, 44-51).

On July 9, 1942, the Bondholders' Committee caused Owen X. Price, the Trustee under the first mortgage trust indenture (R. 17, 55) to institute foreclosure proceedings in the Court of Common Pleas of Clark County, Ohio, against the corporation (R. 18, 52). In that proceeding the Trustee was represented by the corporation's attorney (R. 44) and Mr. Kettering, one of the members of the Bondholders' Committee, was appointed Receiver, although he was a resident of the State of Illinois (R. 24). The corporation filed it answer to the petition for foreclosure, in which it admitted all the allegations contained in the petition and consented to the appointment of a receiver (R. 57).

On December 8, 1942 judgment was obtained in the foreclosure action (R. 59) in the sum of $134,698.21 which included interest at the rate of 8% per annum on the first mortgage bonds from November 1, 1929 to the date of such judgment, and at like rate upon interest coupons maturing subsequent to November 1, 1929 (R. 19). Interest was computed at this rate of 8% per annum despite the fact that the Bondholders' Committee had agreed to reduce that rate to 4% per annum (R. 31, 68). No sale has been

held under the foreclosure judgment. A motion to vacate that judgment was made by respondent, which motion was pending at the time the instant petition was filed. Prior to the institution of this proceeding, a demand was made upon the corporation by the respondent that the corporation itself institute this proceeding for reorganization under Chapter X of the Bankruptcy Act (R. 75). As demand was not complied with, respondent instituted such proceeding.

After this proceeding was instituted, the Bondholders' Committee filed a motion to dismiss the petition (R. 13) which motion was based upon the grounds: (1) that the petition was filed without the authority of the corporation or its Board of Directors and without their necessary assent or autho ity; (2) that it is unreasonable to expect that a Plan of Reorganization could be effected and that such reorganization is impossible because the only creditors (other than taxing bodies) are the Bondholders' Committee, and (3) that the petition was not filed in good faith but for the purpose of attempting to dictate the policy and management of the corporation and to delay or defeat the corporation's effort to pay its bonded indebtedness.

The corporation itself filed an "Application" (R. 15) wherein it stated that it did not consent to the jurisdiction of the Court and did not join in, consent or desire that the proceeding be maintained or any reorganization be had.

ARGUMENT.

THE LEGAL EFFECT OF THE PAST OPERATION OF THE DEBTOR CORPORATION AND OF THE ACTS AND DOINGS OF THE PERSONS WHO CONSTITUTE THE BONDHOLDERS' PROTECTIVE COMMITTEE.

A.

The conduct of the persons presently controlling the corporate affairs.

The only active members of the Bondholders' Committee since its formation in 1923 have been Enoch J. Price and William T. Kettering (R. 24). These same persons were the Voting Trustees of a majority of the outstanding stock of the corporation (R. 25) and Mr. Kettering, while a trustee, purchased some of the corporate stock (R. 25). The Voting Trust Agreement provided that in the event the Bondholders' Committee should fail to secure the refunding of the bond issue, the shares deposited with such Voting Trustees should be returned to the depositors (R. 77, 79). This Voting Trust Agreement was entered into on July 20, 1923 (R. 76, 78) and although the bond issue was never refunded during the succeeding 19 years and more, the shares were never returned to the depositing shareholders by the Voting Trustees. On the contrary, the Bondholders' Committee, as Voting Trustees, continued to vote those shares at each stockholders' meeting for the election of themselves, certain employees of the corporation, James G. Gurney (since 1929) and Harlan T. Hyde (until 1941) as directors of the corporation (R. 44, 46, 49, 50). The Trustees and the corporate employees under their control always constituted a majority of the Board.

In 1929, respondent became a member of the Board of Directors and then attempted to get the other Directors to increase the line of products made by the company and to revise and modernize its sales methods (R. 30). The other Directors refused to adopt these suggestions and had the company continue for many years with no, or practically no sales force, manufacturing only a few types of tools for which there was little demand (R. 31). No member of the Committee controlling the company's affairs was in actual charge or supervision of its operations but the company was, in fact, run by Erna Wheeler as General Manager, who, from 1931 to 1935 received $30.00 a week for her services as operating head of the company, and from 1935 to 1941 received $35.00 per week and thereafter $40.00 per week (R. 23). In operating the company no action was ever taken to increase its line of products, improve its sales methods or lower its production costs by the purchase of more efficient machinery and equipment but, on the contrary, the sole object of the Bondholders' Committee was to spend as little as possible in order to drain off all earnings for application upon the bonds (R. 65).

By May of 1942 the outstanding bond issue had been reduced from $90,000 to $73,000, of which $300 in bonds were outlawed. At that time the company had on hand a large amount of cash but instead of seizing this opportunity to restore the company to a sound financial condition at a time when the entire production of tools in the United States was insufficient to meet the demand, the Bondholders' Committee not only refused to acquire any new equipment but instead drained out of the company $16,000 and applied it on the bonded indebtedness (R. 19).

As respondent at that time was insistent upon the Voting Trustees returning to its owners the stock of Mr. Harlan T. Hyde and Mr. James Gurney, Jr., and also that

the changes he deemed necessary be made in company policy to increase profits and to preserve and increase the stockholders' equity, the Voting Trustees, in their capacity of Bondholders' Committee, caused Owen N. Price, as indenture trustee, to institute the foreclosure suit. Then, in their capacity of Directors, they caused the corporation to admit all the allegations of the foreclosure petition, to consent to the appointment of a receiver and to bring about the appointment of one of their number, Mr. Kettering, as such receiver. No attempt was made to require the Bondholders' Committee to fulfill its agreement that the bond interest should be reduced from 8% to 4% per annum, but, on the contrary, judgment was permitted to be entered in the foreclosure action for interest at 8% per annum from November 1, 1929 (R. 19).

Counsel was immediately obtained by the petitioning stockholders, when they learned of the foreclosure action, to intervene therein (R. 38). In that foreclosure action an order was entered providing for the payment of $3,000 attorneys' fees to the plaintiff's attorney, who, prior to the institution of that action, had been the company's attorney (R. 42) and for the payment of $600.00 to Owen N. Price as the plaintiff Trustee. These payments were made by Mr. Kettering, as Receiver, from the corporate funds despite the fact that the foreclosure proceedings had not and have not been completed nor the property sold therein.

As petitioners claim that the petition was filed without the authority of the corporation, its Board of Directors or its officers, the legal effects of the acts of that Committee, must be considered. Under the terms of the Bondholders' Deposit Agreement the members of the Committee were Trustees for the depositing bondholders (R. 80). Under the terms of the Voting Trust Agreement they were Trustees for the depositing shareholders (R. 76,

78). As Directors of the corporation they were Trustees for all stockholders, depositing and nondepositing, under an implied trust as distinguished from the express trusts created by the Bondholders' Deposit Agreement and the Voting Trust Agreement.

It is too well established to require citation of authority that Trustees are bound to exercise the utmost good faith and the highest degree of care and honesty for the protection of their beneficiaries. It is equally well established that the burden in each case of proving the exercise of that good faith and honesty is upon the Trustees. From the evidence introduced in the instant case, it appears incontrovertibly, that the Bondholders' Committee have violated their obligations to the stockholder beneficiaries by taking every step within their power to extinguish the stockholders' equity in the company and appropriate its entire assets for the benefit of the bondholders. They have consistently refused, during the course of their stewardship of the company's affairs, to take a single step to modernize its equipment, sales force and methods or to increase its line of products or production although sales thereof would be assured. They violated their own agreement to reduce interest on the bonded indebtedness from eight per cent (8%) to four per cent (4%) and caused a judgment to be procured in the foreclosure proceedings for more than $30,000 in excess of the principal and interest actually due under that agreement. As Directors it was their duty to attempt by every means possible to preserve the stockholders' equity, yet they chose to pursue the opposite course and oppose the instant proceeding.

B.

The validity of the election of the present Board of Directors of the corporation.

The Constitution of the corporation provides that notice must be given of all special meetings held to elect directors and that three fifths of the shareholders must be present at any meeting held for that purpose, to constitute a quorum. (Exhibit 22, offered R. 26, Printed R. 43, 44.)

Prior to the year 1941, the number of directors of the corporation was seven (R. 45) of which Harlan T. Hyde, one of the petitioning stockholders in this proceeding, was one. On March 17, 1941, a notice of what purported to be the annual meeting of the stockholders, to be held March 28, 1941, was sent to Mr. Harlan T. Hyde (R. 73). This notice stated: "Inasmuch as nothing of importance will be brought up at the meeting, it will not be necessary for you to attend." This notice was sent by the Secretary of the corporation at the request of the Committee (R. 74). Despite this representation to Mr. Harlan T. Hyde that he should not attend the meeting, the number of directors was, at that meeting, reduced from seven to five and Mr. Hyde was not re-elected a director (R. 45). At that meeting only 648½ shares of the outstanding 1120½ shares of the corporation were represented. As this did not constitute three-fifths of the outstanding shares of the corporation, as was necessary to constitute a quorum, such meeting was wholly invalid and such election was void. (*In re Fidelity Assurance Association*, 42 Fed. Supp. 973, 983; *In re Mississippi Valley Utilities Corporation*, 2 Fed. Supp. 995.)

The next annual meeting of the shareholders of the company was held on March 27, 1942. Admittedly no notice of this meeting was given to Mr. Harlan T. Hyde (R.

75) and at this meeting only 657½ shares of the corporation were represented, being less than three-fifths thereof (R. 46). At this meeting the Board of Directors holding office at the time of the institution of the instant proceedings were elected. Such election was also void, both for lack of quorum and also for lack of notice to Mr. Harlan T. Hyde.

As a result, the Company is without a legally constituted Board of Directors to conduct its affairs and who could authorize the filing of a Chapter X proceeding on behalf of the corporation. *In re Mississippi Valley Utilities Corporation*, 2 Fed. Supp. 995; *In re Fidelity Assurance Association*, 42 Fed. Supp. 973, 983. In the absence of a Board of Directors, it is the stockholders alone who can act for the corporation. Nevertheless the petitioning stockholders did, before instituting the Chapter X proceeding, demand of the corporation that it institute proceedings for reorganization under Chapter X (R. 75).

THE RIGHT OF THE STOCKHOLDERS TO INSTITUTE THE PROCEEDINGS FOR REORGANIZATION.

Even if it be assumed that a *de facto* board of directors exists, it necessarily follows that if, by virtue of being *de facto* directors there are conferred upon persons the rights and powers of *de jure* directors, then there are, necessarily, imposed upon them the duties of *de jure* directors to act for the protection of the corporation and the interests of its stockholders. It is clear that these directors have gone far beyond a passive neglect of the stockholders' interests by failing to seek a reorganization under Chapter X. Here, to the contrary, they have affirmatively attempted to destroy those interests by causing the institution of the foreclosure suit and by their opposition to the instant proceeding, which is the only one in which the stockholders' interests can be preserved.

However, we do not feel that it is necessary to determine whether the present Board of Directors is *de facto*, *de jure* or non-existent in order to determine the right of the stockholders to file the petition for reorganization. Even if it be assumed that the Board of Directors is a *de jure* Board of Directors, their conduct has been such as to give the stockholders the right to institute this proceeding.

Chapter X of the Bankruptcy Act, like its predecessor Section 77-B, was enacted to afford adequate relief to distressed corporations and the Act should be construed liberally to effectuate that purpose. (*Campbell* v. *Alleghany Corporation*, 75 Fed. 2nd 947.)

Courts of bankruptcy in a reorganization proceeding are essentially courts of equity and their proceedings are inherently in equity. (*Continental Illinois National Bank and Trust Company of Chicago* v. *C. R. I. P. R. R. Co.*, 294 U. S. 648, 675; 77 L. Ed. 1110, 1127.)

In discussing the intent of Congress in enacting Chapter X and Chapter XI of the Bankruptcy Act, this Court, in the case of *Securities Commission* v. *United States Realty Co.*, 310 U. S. 435, said at page 457:

> "While a bankruptcy court cannot, because of its own notions of equitable principles, refuse to award the relief which Congress has accorded the bankrupt, the real question is, what is the relief which Congress has accorded the bankrupt and is it more likely to be secured in a Chapter X or Chapter XI proceeding: In answering it we cannot assume that Congress has disregarded well settled principles of equity, the more so when Congress itself has provided that the relief to be given shall be 'fair and equitable and feasible.' Good sense and legal tradition alike enjoin that an enactment of Congress dealing with bankruptcy should be read in harmony with the existing system of equity jurisprudence of which it is a part."

Since *Howes v. Oakland*, 104 U. S. 450, the rights of stockholders of a corporation to prosecute or defend an equitable action in the name and on behalf of the corporation where the officers or directors themselves refuse to act or have interests adverse to those of the stockholders, is so well established as not to require citation of further authority. Such right has been recognized and rules governing the procedure to be followed in its exercise were established both in the former Federal Equity Rules and the present Federal Rules of Civil Procedure (Federal Rules of Civil Procedure, Rule 23-B).

Such right of the stockholders has also been established in bankruptcy cases.

Remington on Bankruptcy, Sections 370, 383

In re Beaver Cotton Mills, 275 Fed. 498; *Ogden v. Gilt Edge Consolidated Mines Co.*, 220 Fed. 723.

If in the instant case it be assumed, for purpose of argument alone, that the acts of the present officers and directors of the corporation did not constitute a violation of the duties imposed upon them by the express trusts and by law, by virtue of being directors, still the mere refusal or inability to act to protect the stockholders' interests gives the stockholders themselves the right to apply to the court of bankruptcy for their protection. *In re Dressler Producing Co.*, 262 Fed. 207.

If recourse can be had to a court of bankruptcy by the stockholders to protect their equity in a solvent corporation, there can certainly be no doubt that recourse can likewise be had to a court of bankruptcy under Chapter X by the stockholders, as the very purpose of Chapter X is to protect the rights and interests of junior lien holders and stockholders which would otherwise be extinguished, just as they would here be extinguished if the State Court foreclosure proceeding is consummated.

Respondent did not file the instant petition as a stockholder but in the right of the corporation for the failure of the corporation itself so to do. The very essence of a derivative action is that the stockholders are filing for and in behalf of the corporation and in the right of the corporation and that the benefits of the action redound to the corporation and not to the stockholders individually. The shareholders here are precisely within the provisions of Section 126 of Chapter X (11 U.S.C.A. 526) for the instant petition is filed by the corporation. As Chapter X must be read in harmony with the existing system of equity jurisdiction of which it is a part. (*Securities Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 457; *Continental Illinois National Bank* v. *C. R. I. P. R. R. Co.*, 294 U. S. 648, 673; 77 L. Ed. 1110, 1127) Section 126 must necessarily be deemed to read "A corporation (or shareholders equitably entitled to appear on its behalf) . . . may file a petition under this Chapter."

It is not our contention that we filed an involuntary petition against the corporation in the capacity of creditors. Therefore the cases cited by opposing counsel that a stockholder is not a creditor within the meaning of the Bankruptcy Act granting the right to creditors to file an involuntary petition are wholly irrelevant to the issues here. The cases so cited to which we refer are *Bryan* v. *Welch*, 74 Fed. 2nd 904; *In Re Piccadilly Realty Co.*, 76 Fed. 2nd 257; *In Re Pittsburg Terminal Coal Corp.*, 30 Fed. Sup. 106; *In Re Liberminaux Corp.*, 10 Fed. Sup. 14; *In Re Phoenix Hotel Co.*, 13 Fed. Sup. 222 and *In Re Arcadia Furniture Co.*, 12 Fed. Sup. 477. Petitioners' citations of 3 *Remington on Bankruptcy*, 5th Ed., Section 1710 and *In Re Newport Corp.*, 96 Fed. 2nd 418, are inapplicable as they refer to the right of a stockholder to appeal in an ordinary bankruptcy proceeding.

BOARD OF DIRECTORS MUST ACT TO AUTHORIZE SUCH PETITION.

Petitioners obviously misconceive respondent's theory, which is that the instant petition was properly filed by the shareholders because of the failure of the purported board of directors to take action, because of the adverse interests of the purported board of directors and because there is neither a *de jure* nor a *de facto* board of directors which could authorize such action.

In the case of *White* v. *Penelas Mining Co.*, 105 Fed. 2nd 726, the Court refused to dismiss a petition for reorganization upon a claim that there was no possibility of reorganization, and found that there was a probability of a reorganization being accomplished.

In re Fidelity Assurance Association, 42 Fed. Sup. 973, is direct authority for respondent's contention that the debtor corporation has no board of directors who could authorize the filing of a petition under Chapter X.

Voeller v. *Neilston Warehouse Co.*, 311 U. S. 531, 85 L. Ed. 322, involved the question of whether an Ohio statute fixing the method of determining the amount to be paid a dissenting shareholder was unconstitutional as depriving the majority shareholders of their right to participate in fixing that valuation when the board of directors failed to follow the statutory procedure. This Court held the statute constitutional as the shareholders rights were protected if the directors did follow the statutory procedure while if they failed so to do the shareholders had a right of action against the directors for negligence. We do not understand petitioners to contend that an action against the directors is the shareholders only remedy, as authority on the question of derivative actions is overwhelmingly to the contrary.

MISCONDUCT AUTHORIZING STOCKHOLDER TO FILE PETITION.

Although the misconduct of the directors in attempting to serve, in a fiduciary capacity, adverse interests is only one of the grounds which entitled respondent to bring the instant proceeding, yet that course of action brings this proceeding precisely within the rules laid down in *Hawes* v. *Oakland*, 104 U. S. 450.

Petitioners' claim a failure to show the stockholders made earnest effort to obtain redress. Petitioners then claim that although effort was made to obtain such redress, the time given the corporation to act was insufficient. This statement comes with ill grace in view of the fact that these same gentlemen had brought about the institution of foreclosure proceedings, had filed an answer therein admitting the right to foreclose, have, in the District and Circuit Courts, opposed, by every means within their power, the consummation of the reorganization upon respondent's petition and are, in this Court, displaying equal determination to bring about its dismissal. If they wished to join in respondent's petition for reorganization by formal action, respondent would have welcomed it.

It is stated that the company drifted along for 19 years and intimated that now that the company is making a profit there is something shameful or wrongful in the stockholders attempting to protect their equity because that equity is more valuable now than it was in the past. With equal justification it can be said that for those 19 years the bondholders took no action to deprive the shareholders of the value of their equity and that only when its value became enhanced did the bondholders, for the first time, take the affirmative action of the foreclosure

suit. Until that affirmative action was taken there was neither necessity for nor right in the stockholders to take any action to protect their interests.

Petitioners advance as an excuse for their permitting this company to drift along for 19 years, and permitting its machinery and equipment to become antiquated and obsolete and for their refusal to modernize or increase its line of products that this is a matter of "business judgment". For their failure to accept Mr. Gurney's offer in 1942 to pay the fee of an industrial engineer for making an inspection and recommendations as to the plant and to accept his suggestion that the cash on hand be used to purchase modern equipment, or even to borrow from defense agencies set up for that purpose, appellees advance other excuses. This time that it is common knowledge that it would "probably" have been impossible to procure such new equipment and that it would have been expensive, that labor could not be secured, that the duration of the emergency is unknown, that a similar program had been ill advised during the first World War, at which time it is claimed the Hydes and the Gurneys were in control of the company. Not only is there not a scintilla of evidence in the record supporting such excuses or such contentions, but petitioners now attempt to use the results of this policy of letting affairs drift as an argument that the company is insolvent and there is no equity for the stockholders because the earnings resulting from that unbusinesslike policy were not large. Logically, it would seem that the results of the policy adopted by the other directors being so poor, the policy urged upon them by Mr. Gurney since 1929 was the only one that displayed any exercise of good business judgment, and that the stockholders should be given an opportunity to rectify the mistakes and misconduct of the Bondholders' Committee.

It should here be noted that the demand to institute the Chapter X proceeding was not made upon the directors, but upon the corporation (R. 75).

The illustration offered by petitioners of the "good faith" of the directors and the Committee is illuminative of what they deem to be a proper exercise of fiduciary duties. They state that they could have caused the corporation to pay to themselves, as a Committee, funds as interest on the bonds and then have ased such funds, not for the purpose for which the funds were disbursed, but to purchase bonds at a discount of 75% to 90% and then held such bonds as a claim against the corporation for the full face amount. It is elementary that a fiduciary, or an agent, in using trust or his principal's funds to purchase obligations, acquires them for the beneficiary or the principal at the discounted price and cannot enforce them at a higher amount. The actual practice followed by the Trustees, for which praise is asked and good faith claimed, not only was the only course which they could legally have adopted but also resulted in a benefit to the other bondholders by increasng the value of the remaining bonds outstanding and the amount of interest which could be paid thereon. No explanation is offered as to what interest of the shareholders was subserved when these directors caused the corporation to vote to themselves as the Bondholders' Committee $1,000 for Committee expenses (Exhibit 23, offered R. 42, printed R. 48).

VOTING TRUST IS VALID.

Under this subdivision petitioners argue only that the Voting Trust Agreement was valid at its inception. Assuming that to be true, its provision for termination upon failure to refund the bond issue, is equally valid. As almost twenty years passed without such refunding by the

Trustees, the trust necessarily terminated and the shareholders were entitled to the return of their stock and may treat the trust as terminated.

Laches could not be asserted by the Trustees against the depositing stockholders for that defense may be presented by trustees against their beneficiaries only for delay occurring subsequent to a disclaimer of the trust by the trustees (*Bonnell* v. *Brown*, 11 C.C. (N.S.) 58; affirmed 80 Ohio St. 710), nor could the beneficiaries of the trust be estopped, for they have taken no affirmative action in reliance on which the Trustees changed their position. The case of *Warren* v. *Pim*, 66 N. J. Eq. 353, does not support even the contention that the trust was valid at its inception as it holds that the voting trust there under consideration was illegal and void as its object and aim was not the equal benefit of all shares.

AS TO CLAIM THAT DIRECTORS WERE ILLEGALLY ELECTED

As above stated the shareholders' meetings at which the present purported directors were elected were void for lack of quorum and lack of notice.

AS TO DE FACTO DIRECTORS

Petitioners contend:

(a) That the five persons purporting to act as directors are *de facto* directors if they are not *de jure* directors, and

(b) that as *de facto* directors their acts are valid and binding upon the corporation and cannot be collaterally attacked.

In essence petitioners' position is that as *de facto* directors they alone are entitled to protect the stockholders'

interests and if they determine to refuse to utilize Chapter X, which is the only proceeding affording a protection for those interests, and even though they have instituted the foreclosure action, no one else has the right or power to save from destruction that which they, *themselves*, *have* set about to destroy.

None of the cases cited supports the contention that the invalidity of the election of directors cannot be collaterally raised, and in fact, two of them are authority to the contrary.

In *Ehrman* v. *Union Central Life Insurance Co.*, 35 O. S. 324, 339, there is no reference on page 339, nor elsewhere, to *de facto* directors; the only question involved was whether plaintiff corporation acquired a note in an *ultra vires* transaction. Nor did *Clarke* v. *Thomas*, 34 O. S. 46, involve a question of *de facto* directors. The sole question there was whether a stockholder, who had received notice of a stockholders meeting called for the purpose of increasing the capital stock, and who subscribed to the new issue, was estopped from presenting the defense, in a suit for the balance of his subscription price, that some other stockholder had not received notice of the meting, which other stockholder had both accepted and paid for his new stock.

In *First Presbyterian Society* v. *Rogers*, 12 O. S. 248, the Ohio Supreme Court, by reversing the lower Court, held that there should be determined, in an action for the recovery of real property, a collateral proceeding, the question of who were, in fact, the *de jure* or *de facto* directors of plaintiff corporation.

The case of *First Presbyterian Society* v. *First Presbyterian Society*, 25 O. S. 128, 133, required a determination as to which of two groups, each claiming to be the corporate members of the Church Society, was entitled to a fund

bequeathed to the Society. The executor defended on the grounds that this question could be determined only by *quo warranto* and not in that collateral proceeding. The trial court ordered the non-party group made a party defendant and determined the rights of each group in that collateral proceeding, which procedure was approved by the Supreme Court of Ohio in its affirmance.

RATE OF INTEREST.

By Exhibit 7 (Offered R. 20, Printed R. 68) it is disclosed that the Bondholders' Committee had agreed to reduce the rate of interest to four per cent; by the uncontradicted testimony of Mr. Gurney (R. 31) it appears that as late as May of 1942 Mr. E. J. Price admitted that the Bondholders' Committee had agreed to reduce the interest to four per cent. Petitioners argue here that the Committee had no power to make such an agreement, yet on page 28 of their brief they take the position that the Committee, not the bondholders, is the creditor, and they allege that the Committe are the real holders of the bonds for every purpose connected with enforcing rights under them.

Petitioners also contend that an agreement to reduce the rate of interest would be without consideration and illegal. Such is not the law.

In the case of *Adams Recreation Palace* v. *Griffith*, 12 O. O. 134; 53 Ohio App. 216, the Court held valid an executory agreement between landlord and tenant reducing rent on the ground that the imminent insolvency of the lessee and the desire of the lessor to retain the tenant was sufficient consideration. This case was discussed with approval in 13 Ohio O. 343 and cited with approval by the Supreme Court of Ohio in *Gholson* v. *Savin*, 19 Ohio O. 309, 314; 137 Ohio St. 551.

In the instant case, the corporation's inability to pay the full eight per cent interest and the desire of the Committee to have the corporation continue in business and pay interest at a reduced rate, was sufficient consideration for the agreement.

RATE OF INTEREST ADJUDICATED.

Respondent does not contend that petitioners failed to observe every technical step required to complete the destruction of the stockholders' interest in the foreclosure proceeding. The observance in that suit of the legal technicalities cannot excuse either its illegal object or their failure to defend it on behalf of the corporation. Much less can their actions there excuse their opposition to this proceeding, which is the only one now available to protect the corporation and the stockholders' equity therein. Petitioners now claim that respondent could have appeared in the foreclosure proceeding to undertake the duties of defending it for the corporation, yet contend that respondent cannot protect those interests in this proceeding. It seems hardly likely that the strenuous objections here interposed against the right of any but petitioners to appear for the corporation would not have been made in the foreclosure suit which they themselves caused to be instituted. Respondent was not guilty of laches as counsel was retained immediately upon learning of the foreclosure suit (R. 38) and as above pointed out a trustee cannot assert laches until he has disclaimed the trust.

LACHES OF COMPLAINING STOCKHOLDERS.

Petitioners also attempt to impute laches to the stockholders for failure to take action for many years prior to the foreclosure proceeding. The answer to that contention is two fold. First, until some affirmative action violative

of their trust had been taken by the Trustees (here the institution of the foreclosure suit) there was no reason for the stockholders to act nor did a cause of action accrue to them. (*Langworth* v. *Hunt*, 11 O. St. 194; *Ormsby* v. *Langworth*, 11 Ohio St. 653; *Crimp* v. *Union Bank*, 352 Ill. 93; 185 N. E. 236; *Jensen* v. *Snow*, 131 Me. 415; *Bonnell* v. *Brown*, 11 C.C. (N.S.) 58; affirmed 80 Ohio St. 710.) Second, there has been no change in position by the Trustees, in reliance upon the shareholders non-action, which resulted in a detriment to the Trustees.

DUTY OF CORPORATION TO FILE A PETITION FOR REORGANIZATION.

Respondent does not deny that where a corporation has a valid board of directors, the members of which are honestly and fairly performing their duties for the best interests of the corporation, the question of whether or not a petition for reorganization of that corporation should be filed is one to be determined by the board of directors, but where, as here, the interests of the directors are antagonistic to that of the corporation and it is for the best interests of the corporation that a reorganization be had and such directors not only wilfully fail to institute such a proceeding, but actively oppose it, then the stockholders, and the stockholders, alone may act. The Circuit Court of Appeals in its opinion said no more (R. 119). In the instant case not only were the interests of those persons purporting to act as directors of the corporation antagonistic to that of the corporation, but the corporation had no valid board of directors who could act for it (*In Re Mississippi Valley Utilities Corporation*, 2 Fed. Sup. 995; *In re Fidelity Assurance Asso.*, 42 Fed. Sup. 973; *In Re Dressler Producing Co.*, 262 Fed. 257.)

As was said in the case of *Eggers* v. *National Radio Co.*, 281 Pac. 58, 61, 208 Cal. 308:

> "It would be a reproach to the law if the stockholders in such a case as this were remediless. * * * The right of a stockholder to take means to conserve the corporate property to prevent its loss to the corporation or the impairment of its value, proceeds upon the principle that whatever is or may be inimical or injurious to the corporation is or may be an injury to the stockholder, and he is therefore entitled to equitable relief."

DUTY OF CORPORATION TO MAKE DEFENSE IN FORECLOSURE SUIT.

Not only did the Bondholders' Committee, in its *alter ego* of Board of Directors fail to make a defense in the foreclosure action—they instituted and prosecuted that action to judgment.

While respondent's motion to vacate that foreclosure judgment was pending, the instant proceedings were instituted to prevent the destruction of the stockholders' equity and to permit the corporation to continue in business, to serve which purposes Chapter X was enacted.

It is incontrovertible that directors must act for the best interests of the corporation and its stockholders. Even if the foreclosure action had been instituted by independent parties, it would have been the duty of the Directors to cause the corporation to present every defense it possessed in that action. Possessing at least a partial defense, it presented none.

Respondent further contends that if the corporation had possessed no defense to the foreclosure action itself, it would have been the duty of these directors to institute this proceeding as the need for reorganization is present,

both to protect the stockholders' existing equity and to preserve the good will value of the corporation as a going concern.

Each and every action of the petitioners here has been violative of their duties as directors and the instant proceeding is the only one which can prevent the petitioners from attaining their objective and which will preserve the corporation.

SOLVENCY OF THE CORPORATION.

Petitioners contend that respondent failed to prove his charge that excess interest had been charged and allowed in the foreclosure action. There was no failure of proof but a lack of opportunity to present such proof. The hearing was held in the District Court upon petitioners' motion to dismiss the petition, not upon an answer to it which raised any issue of fact, and the petition was dismissed in the District Court upon the ground that the stockholders had no right to institute the proceeding for and on behalf of the corporation. Subsequent to the reversal of that judgment by the Circuit Court of Appeals, the District Court has referred the cause to a Special Master under a general reference with instructions to first determine and report upon the question of good faith in the filing of the petition. The Circuit Court of Appeals in its opinion stated that there could be no good faith unless an interest existed for the stockholders. It is not necessary to argue the correctness of that statement inasmuch as such an interest does exist for the stockholders.

Subsequent to the reference to the Master, and to enable respondent to prepare for such hearing, petitioners submitted to respondent the balance sheet of the corporation as of December 31, 1943, and the income tax return filed by the corporation for the year 1943. According to its own books, as of that date the corporation had current assets

of approximately $165,500.00 consisting of cash, accounts receivable, Treasury tax savings notes and inventories of $31,133.54; it had fixed assets of approximately $50,000.00 and a contingent tax rebate of approximately $14,000.00. Its only liabilities were current accounts payable of approximately $3,700.00, reserve for income taxes of approximately $108,350.00 and the mortgage debt which had been reduced to $116,168.29.

It appears that during the year 1943 the corporation had a profit before federal taxes of $134,168.73 with a reserve set up for those taxes of $108,353.45, which would indicate a net profit for the year 1943 of $25,755.28.

According to this balance sheet the liabilities exceeded the assets by $7,130.45. By the appraisal made in the foreclosure proceedings (Exhibit 21, offered R. 26, printed R. 89) the fixed assets were appraised at $7,008.45 more than their value as given on the balance sheet of December 31, 1942 (Exhibit 19, offered R. 26, printed R. 84-86). This would decrease the book deficit to $121.98. The corporation has continued, since December 31, 1943, to operate at a substantial monthly profit. The balance sheet or book value reflects no good will value nor any value as a going concern, both of which are proper subjects for consideration as to whether an equity exists for the stockholders and, in fact, this Court has stated that earning capacity is the true test of value. (*Consolidated Rock Co.* v. *DuBois*, 312 U.S. 510; also see Finletter: The Law of Bankruptcy Reorganization, page 555, *et seq.*) Nor does the balance sheet give consideration to respondent's contention that the mortgage debt as shown thereon should be reduced by approximately $35,000.00 by reason of excess interest accrued and paid.

The mortgage debt, as shown on the balance sheet of December 31, 1943, of $116,168.29 includes not only the excess interest of approximately $30,000.00 included in the judgment decree, but also the sum of $10,710.08 repre-

senting interest at 8% per annum from the date of that decree to December 31, 1943. If respondent's contention is correct that that debt should bear interest at the rate of only 4% per annum, the book liability should be decreased by the further sum of $5,355.04 with a corresponding increase in the stockholders' equity.

A PLAN OF REORGANIZATION CAN BE EFFECTED.

Petitioners base their contention that no reorganization can be effected upon the ground that they, as the Bondholders' Committee, will oppose any plan of reorganization. No plan of reorganization has been proposed and if, after hearing, the District Court finds that the petition was filed in good faith it could hardly do otherwise than appoint a Trustee rather than leave the debtor in possession. Under such circumstances the Trustee alone can present a plan of reorganization.

The present opposition of the Bondholders' Committee to any plan of reorganization which might be proposed is wholly irrelevant, and will remain irrelevant until the feasibility of the plan itself has been determined. (*In re 263 W. 38th St. Corporation*, 37 Fed. Sup. 667; *In re Castle Beach Apartments*, 113 Fed. 2nd 762.)

Secondly, the petitioners are not the actual owners of the bonds but merely representatives of the owners. As such they must act for the benefit of the owners and have no right to vote upon a plan of reorganization in the place and stead of the owners themselves. (*In re Castle Beach Apartments*, 113 Fed. 2nd 762.)

Section 212 of the Bankruptcy Act, 11 U.S.C.A. 612, specifically provides that the Court may disregard any provision of the deposit agreement by which the creditor is represented and may authorize an accounting there-

under. In the instant case not a single one of the fifty bondholders (R. 29) is objecting to this proceeding but the objections are all being advanced by the petitioners. The record does not disclose that any member of the Bondholders' Committee owns a single bond of the company. Not only is it the bondholders themselves who should determine whether any plan which may be presented is fair and equitable, but in the light of the actions of this Committee a Court would be fully justified in disregarding its refusal to consent to a plan of reorganization on the ground of bad faith. (Bankruptcy Act, Section 203, 11 U.S.C.A. 603.) In fact the acceptance of a plan by anyone other than the creditors themselves must be specially authorized by the creditors. (Remington on Bankruptcy, Sec. 4516, 1942 Sup. page 111.)

The petitioners have even less authority to object to the propriety of the filing of respondent's petition than they would have to consent to or refuse to accept a plan of reorganization when one is presented, as it is the creditors alone who can make such objections. (*In re Loeb Apartments*, 89 Fed 2nd 461.)

The case of *In re Witherbee Corp.*, 88 Fed. 2nd 251, not only does not support the statement for which petitioners cite it but it was there held that the Bondholders' Committee could vote the bonds only if the bondholders themselves were first given an opportunity to withdraw them from deposit and had failed so to do.

Respondent does not deny that the petition should be dismissed if it is unreasonable to expect that a plan of reorganization could be effected, for the statute provides that that is one of the elements to be considered in determining whether the petition is filed in good faith. (Bankruptcy act, Sec. 146, 11 U.S.C.A. 546.) But the question of good faith is yet to be determined in this case

and a reference has been made to determine that question. Therefore, petitioners' contention, at this time, that it is unreasonable to expect a reorganization to be effected is premature as well as unauthorized and irrelevant.

A cause should be dismissed for lack of good faith only if it is clear that there is no reasonable possibility of reorganization and that the petition was filed for the purpose of delaying creditors. (*Witters* v. *Ebsarz Co.*, 95 Fed. 2nd 746; *In re Julius Roehrs Co.*, 115 Fed. 2nd 723; *Snyder* v. *Fenner*, 101 Fed. 2nd 736; *In re 325 E. 72nd St.*, 53 Fed. Sup. 997.)

THIS PROCEEDING WILL BEST SUBSERVE INTERESTS OF INTERESTED PARTIES.

It is apparent that the pending State Court foreclosure proceedings will destroy the corporation as a going concern and will extinguish the shareholders' equity for that is its object and its purpose. All of the corporate assets, except cash and accounts receivable, will be sold under the foreclosure decree and the cash and accounts receivable will be applied upon the deficiency, which, obviously, will be large in view of the fact that the book value of the fixed assets and inventories is only $80,000.00 as compared to the foreclosure decree indebtedness in excess of $116,000.00. No proceeding other than the instant one exists which will serve to maintain the corporate existence, enable it to continue as a going concern and preserve the stockholders' equity.

CONCLUSION.

The decision of the Circuit Court of Appeals is clearly correct applying, as it does, well established principles to the instant facts and since the petitioners have shown no sufficient reason for review by this Court it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

I. E. Ferguson,
77 W. Washington St.,
Chicago, Ill.,

Charles W. Stiefel, Jr.,
30 N. LaSalle St.,
Chicago, Ill.,

George R. Murray,
Callahan Building,
Dayton, Ohio,
Attorneys for Respondent.

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No. 410

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

IN THE MATTER OF PROPOSED REORGANIZATION OF THE WESTERN TOOL & MANUFACTURING COMPANY, A CORPORATION,
Debtor.

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.,
Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co.,
Respondent.

Brief for Respondent.

I. E. FERGUSON,
77 W. Washington Street,
Chicago, Illinois,

CHARLES W. STIEFEL, JR.,
77 W. Washington Street,
Chicago, Illinois,

GEORGE R. MURRAY,
Callahan Building,
Dayton, Ohio,
Attorneys for Respondent.

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INDEX.

	PAGE
STATEMENT OF THE CASE	1-4
ARGUMENT	
I. The Failure of The Directors To Institute Proceedings Under Chapter X, In Itself Warrants That Action By the Shareholders	5, 6
II. The Claimed Right of The Bondholders to Collect Interest at 8% Per Annum Has Not Been Adjudicated	6
III. The Company Is Solvent	7
IV. Reply to Petitioners' Contention that There Is "No Reasonable Expectation That A Reasonable Plan of Reorganization Can Be Effected"	8-10
V. Reply to Reply Brief of Petitioners In Support of Petition For Writ of Certiorari	10-13
A. Applicability Of John Hancock Mutual Life Insurance Co. v. Casey, 141 Fed. 2nd. 104	10, 11
B. "A Possible Method of Reorganization"	11, 12
C. "Duty of Corporation To Make Defense In Foreclosure Suit"	12
D. "Solvency Of The Corporation"	12, 13
CONCLUSION	13

CASES CITED.

Chicago v. Mills, 204 U. S. 321	5
Consolidated Rock Products Co. v. DuBois, 312 U. S. 510	7
Cromwell v. County of Sac, 94 U. S. 351	6

PAGE

CASES CITED (Continued).

Delaware & Hudson Co. v. Albany & Susquehanna R. R. Co., 213 U. S. 435 5
Dodge v. Woolsey, 18 How. 331 5
Fidelity Assurance Asso. v. Sims, 318 U. S. 608 8
In Re Francfair Inc., 13 Fed. Sup. 513 9
In Re Reliable Estates, Inc., 33 Fed. Sup. 588 9
Institutional Industries v. C. M. St. P. R. R. Co., 318 U. S. 523 7
John Hancock Mutual Life Insurance Co. v. Casey, 141 Fed. 2nd. 104 10
Minati Sugar Co. v. Mock, 75 Fed. 2nd. 284 9
Seaboard Terminal Corp. v. West Md. R. R., 108 Fed. 2nd. 911 10
Tennessee Publishing Co. v. American National Bank, 81 Fed 2nd. 463 8
Third National Bank of Louisville v. Stone, 174 U. S. 432 6
United Copper Co. v. Amalgamated Copper Co., 244 U. S. 261 5
Washington etc. Packet Co. v. Sickles, 5 Wall. 580 6

STATUTES CITED.

Bankruptcy Act Sec. 169 (11 U.S.C.A. 569) 9
Bankruptcy Act Sec. 179 (11 U.S.C.A. 579) 12
Bankruptcy Act Sec. 216 (7) (11 U.S.C.A. 616 (7)) 12

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Brief for Respondent.

STATEMENT OF THE CASE.

This brief is intended to supplement respondent's Answer In Opposition To Petition For Writ Of Certiorari merely to designate the allegations appearing in the

Petition For Writ Of Certiorari and Brief In Support Thereof and petitioners' Reply Brief, which are unsupported by the evidence or contradicted thereby, to answer certain arguments advanced by petitioners in those Briefs and to cite certain additional authorities.

In petitioners' Statement of Matter Involved it is alleged that the affidavit of James G. Gurney, attached to the petition (R. 4, 9), does not disclose that he acted for the other stockholders for whom he is the agent and attorney-in-fact. Not only does the affidavit state that Gurney has full power and authority to do all things which the other stockholders might or could do in the protection or advancement of their interest as shareholders of said corporation (R. 4, 5), but the attorney for petitioners stipulated (R. 29) that Mr. Gurney represented such other stockholders in the proceeding.

The following allegations in petitioners' Statement of The Case are wholly unsupported by the evidence:

1. That the reason for the institution of the foreclosure suit was that the time had arrived to dispose of the plant and business since none of the interested parties was actively engaged in its operation. Actually the foreclosure suit was instituted as the result of Mr. Gurney's demand in May 1942 (R. 8) that the Voting Trustees return, to the depositors, the stock deposited by them and that the Company take advantage of the increased demand for its products by improving its machinery and equipment and production methods (R. 29, 30).

The argumentative statement of petitioners to support this allegation is a curious one, in view of the admission which precedes it, that at the time the foreclosure suit was instituted the company's business had improved and it was operating at a profit.

2. That Gurney advocated a plan providing for his control of the company. Actually the evidence is that Gurney requested the Committee in May 1942 to utilize some of the cash the company had in its treasury, or to borrow from defense agencies set up for that purpose, to purchase new equipment which would increase the output of the company and lower its cost of production (R. 30). Gurney had previously consulted an outstanding production engineer who had agreed to make recommendations, and Gurney had offered to pay, himself, the fee of this engineer if the directors would accept the engineer's recommendations (R. 30). This request was refused despite the fact that the equipment and machinery of the company were then admittedly antiquated and inefficient (R. 65, 72).

In the same meeting, Gurney informed the Committee that, by reason of his long experience as a tool manufacturer's representative, he could sell, to his regular customers, whatever part of the increase in production was not taken by the government or its agencies, for which services he asked only the same commission which Mr. Kettering had been receiving on the few sales made by him, namely, 10% (R. 28, 30). There is not a scintilla of evidence in the record that he sought control of the company.

3. It is alleged that the failure of the quorum at the stockholders' meetings, at which the directors were elected in 1941 and 1942, was due to Gurney's absence from those meetings. The theory behind this, seemingly, is that if Gurney had been present he would have represented his mother, Stella Gurney, who had received no notice of the meeting. There is no evidence whatsoever in the record that Mr. Gurney "represented" his mother at any stockholders meeting nor of any proxy ever given for that

purpose. Being a stockholder himself, his presence at the meeting could not be deemed to be representative of any one other than himself, without such proxy. In any event, the failure to give notice of the 1942 meeting to Harlan T. Hyde could not have been waived by any act of Mr. Gurney. The record itself discloses that, as early as 1935, the election of directors was illegal for lack of quorum at the shareholders' meeting, at which such election was purportedly had (R. 49).

ARGUMENT.

I.

THE FAILURE OF THE DIRECTORS TO INSTITUTE PROCEEDINGS UNDER CHAPTER X, IN ITSELF WARRANTS THAT ACTION BY THE SHAREHOLDERS.

It is not a prerequisite to the *institution of a derivative* action by shareholders that directors be guilty of fraud. It is enough if the subject of the stockholders' complaint is an imputed violation of the rights growing out of the corporate franchise for which there is not an adequate remedy at law. *Dodge* v. *Woolsey,* 18 How. 331. It is likewise sufficient if the directors stand in a dual relation which prevents an unprejudiced exercise of their judgment. *United Cooper Co.* v. *Amalgamated Copper Co.,* 244 U. S. 261, 264. *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.,* 213 U. S. 435, 447, 449.

The attitude of the directors need not be sinister to warrant such suit by the stockholders and may be sincere, but it is enough if the attitude is antagonistic to the company's interests. *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.,* 213 U. S. 435, 451; *Chicago* v. *Mills,* 204 U. S. 321.

Even if it could be argued, here, that the directors of the company were not guilty of breaches of their duty to the shareholders, there cannot be the slightest doubt but that they occupied a dual position and that their failure to defend the foreclosure suit and their determined resistance to reorganization under Chapter X, are antagonistic to the interests of the company. Even if the foreclosure suit had been instituted by an independent mort-

gagee, it would have been antagonistic to the company's interest for the directors to refuse to seek a reorganization under Chapter X in view of the increase in the company's business, its solvency and the enhancement of its earnings. The failure of the board of directors to seek such reorganization, itself warrants the stockholders' action.

II.

THE CLAIMED RIGHT OF THE BONDHOLDERS TO COLLECT INTEREST AT 8% PER ANNUM HAS NOT BEEN ADJUDICATED.

Petitioners argue that the state Court decree, in allowing interest upon the unpaid principal of the bonds at the rate of 8% per annum, is final and binding upon the Bankruptcy Court unless fraud, therein, is proved. Such argument is fallacious. The rule of estoppel by judgment does not apply, as the question of the amount of interest, for which the corporation was liable, was never in issue nor litigated in the state Court proceeding. *Third National Bank of Louisville* v. *Stone*, 174 U. S. 432; *Cromwell* v. *County of Sac*, 94 U. S. 351, 353; *Washington, etc. Packet Co.* v. *Sickles*, 5 Wall. 580, 592. As, in the state Court proceeding, the corporation filed an answer admitting all of the allegations of the petition to foreclose (R. 37), the rate of interest owed could not have been in issue nor litigated. The shareholders not being a party to that proceeding, it is not *res adjudicata* as to them. The record, itself, shows that the Bondholders' Committee had on several occasions accepted interest in full at less than 8% per annum (R. 2).

III.

THE COMPANY IS SOLVENT.

In addition to the facts, disclosing the solvency of the corporation, set forth in respondent's Answer In Opposition To Petition For Writ Of Certiorari, respondent wishes to point out that the record, itself, discloses that the company had a substantial good will value even in May 1941 (R. 67). Petitioners claim that an indication of insolvency is the action of the directors, in September 1941, authorizing the purchase of bonds at not more than twenty-five cents on the dollar—the basis of that claim is not stated nor is it apparent. There is present, however, an indication that the stock itself had a value in March 1942, for at that time Mr. Kettering, one of the Committee members, individually acquired some of that stock (R. 47).

In the case of *Institutional Industries* v. *C. M. St. P. R. R. Co.*, 318 U. S. 523, this honorable Court held that even though there had been increased earnings which might be considered abnormal, such earnings were not sufficient to permit a dividend on the new preferred or common stock proposed to be issued and, therefore, this Court would not say that the junior interests had carried the burden of showing that subsequent events made necessary a rejection of the Commission's plan. This Court did not hold that an increase in earnings should be ignored and, in fact, in that decision the holding in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, that the only true criterion of the value of the debtor's property is its earning capacity, was reaffirmed and approved.

IV.

"NO REASONABLE EXPECTATION THAT A REASONABLE PLAN OF REORGANIZATION CAN BE EFFECTED."

Under this heading of petitioners' Brief in support of their petition for certiorari, petitioners again assume to speak for the bondholders, themselves, as to whether or not the bondholders would consent to a plan of reorganization as and when the same is presented. Petitioners cite a number of cases in support of their contention that the instant petition should be dismissed, it being unreasonable to expect that a plan of reorganization can be effected. Not one of the cases cited is in point.

The case of *Fidelity Assurance Asso.* v. *Sims*, 318 U. S. 608, clearly is not applicable to the instant facts. There it was admitted that the debtor was insolvent and that no reorganization, as a going concern, was possible. A plan had been presented which was, in effect, merely an alternative for ordinary bankruptcy without any readjustment of the rights of creditors and stockholders *inter se*. The only question there presented was whether a proceeding for liquidation was proper under Chapter X and it was held that such proceeding was not contemplated by Chapter X. It was further held that, in that particular case, the liquidation, there sought, could be accomplished as well in the pending state Court proceeding as in the Federal Court and that an original bankruptcy proceeding could not be permitted for, unless Chapter X applied, the action had been instituted in the wrong district.

In the case of *Tennessee Publishing Company* v. *American National Bank*, 81 Fed. 2nd. 463, a plan of reorganization had been presented and dissented from by fifty per cent of the creditors. The Circuit Court of Appeals

believed that the lack of feasibility of the plan affected the good faith in its filing; this holding was dissented from by Judge Allen. When this Court passed upon the case, 299 U. S. 18, it was said, page 22:

> "Nor do we need to inquire as to the precise limits of the concept of 'good faith' as required by Section 77B, what ever these limits may be, the statute clearly contemplates the submission of a plan of reorganization which admits of being confirmed as 'fair and equitable' and 'feasible'. * * * Unless the District Judge finds that the plan has these qualifications he need go no further. Unless he so finds he has no authority to proceed."

Obviously this Court grounded its decision on the lack of fairness and feasibility of the plan which had been presented. In the instant case, no plan has been or could have been presented as yet.

The case of *Minati Sugar Co.* v. *Mock*, 75 Fed. 2nd. 284, was a reorganization proceeding under Section 77B. The Court held that the creditors filing such a petition should have shown that a plan of reorganization would be forthcoming. Under Section 77B creditors could propose a plan but as, under Chapter X, if a Trustee is appointed, only the Trustee can propose a plan (*Bankruptcy Act*, Sec. 169, 11 U.S.C.A. 569) respondent could not have alleged that a plan would be presented as the right so to do could, here, have been determined only by subsequent events.

The case of *In Re Francfair Inc.*, 13 Fed. Sup. 513, involved the question of whether the plan there presented was fair and feasible. Likewise, in *In Re Reliable Estates, Inc.*, 33 Fed. Sup. 588, a plan of reorganization had been presented and it appeared that the debtor's own petition disclosed that the property was worth less than the mortgage and a voluntary petition in bankruptcy had previously been filed disclosing the debtor's interest in the property as "none".

In *Seaboard Terminal Corp.* v. *West Md. R. R.*, 108 Fed. 2nd. 911, the Court found that the debtor had no property which could be the basis of a reorganization and that in the previous ten years of its history its debt had constantly increased. Here, the debtor has property, which not only can be the subject of reorganization, but unless a reorganization can be had under Chapter X, will be wholly lost to it and the value of that property exceeds the mortgage debt, which debt has been periodically reduced. In addition, the corporation here has shown large earnings since 1941 and has the capacity for a continuation of those earnings, if its equipment is modernized and its manufacturing and sales policies made more progressive.

V.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

Applicability of John Hancock Mutual Life Insurance Co. vs. Casey, 141 Fed. 2nd. 104.

Petitioners cite the above case as authority for their contention that reorganization, here, is either impossible or unnecessary, on the theory that any plan must be acceptable to the Bondholders' Committee and, if acceptable, no court proceedings are called for. That case did not so hold.

The plan presented, there, proposed a utilization of funds, received by the debtor from a condemnation proceedings, to make good the debtor's mortgage default

(but not to pay, or alter the mode of payment of the unpaid balance of the mortgage), the balance to become a part of the general assets and be used to pay unsecured creditors over a period of years. The mortgagee claimed it was entitled to the entire condemnation proceeds for its damages by reason of the decline in value, or impairment of its security. The Trustee conceded that no reorganization would be possible if the Court should find that the proceeds belonged to the mortgagee. The court did not determine that question but concluded that a reorganization, under Chapter X, was either unnecessary or impossible, for all the debtor would have obtained by the plan was an extension of its unsecured debts which was obtainable under Chapter XI, in which event the proceedings could be transmuted into a Chapter XI proceeding; it was further held that if the District Court should determine that the condemnation fund belonged to the mortgagee, then reorganization was concededly impossible and the proceeding should be transmuted into one of ordinary bankruptcy.

B.

"A Possible Method of Reorganization."

This subdivision of petitioners' argument is wholly irrelevant as there has been no plan of reorganization presented. The argument amounts to the creation and destruction of a strawman, namely, the description of a plan of reorganization to which, if presented, the Bondholders' Committee would not consent and the reasons why they would refuse. There is nothing whatever in the record which discloses that additional capital is necessary, that, if necessary, the stockholders would refuse to make any contribution, that the bondholders would be required to put in further money or that outside capital could be ob-

tained only by subordinating the present bonds to a new loan. It is also possible that a new mortgage could be procured in amount sufficient to pay off the principal and interest due on the present mortgage, in which event the consent of the bondholders would not be necessary. (Bankruptcy Act, Secs. 179, 216 (7), 11 U.S.C.A. 579, 616 (7).

C.

"Duty of Corporation to Make Defense in Foreclosure Suit."

The argument presented by petitions under this subdivision is unique. It is that if the directors of a corporation whose duty it is to present, in a foreclosure action against it, all existing defenses, fail to present those defenses, then it becomes the duty of the stockholders, who are not parties to that action, to present such defenses and, failing so to do, the stockholders are barred from protecting the corporation's interests in any other legal proceedings otherwise available to the corporation and to the stockholders. To state the argument demonstrates its fallacy.

D.

"Solvency of the Corporation."

Respondent's allegation that there would be a deficiency arising from the sale of the assets under the foreclosure decree is certainly not an admission that the company is insolvent. Such a sale would be a distress sale and the value of the corporation, as a going concern, would be wholly lost thereby.

Even on the balance sheet and earning statements for the year 1942 the company is solvent, when there is taken

into account the approximate $30,000.00 of interest set forth therein as past due on the bonds, which is in excess of the amount actually due, and the fact that no good will value or going concern value is disclosed by such balance sheet, plus the fact that the appraised value of the machinery and equipment (R. 89) is $7008.45 more than their balance sheet value.

Respondent, in his Answer In Opposition To Petition For Writ Of Certiorari, stated the facts, as shown by the company's own balance sheet and profit and loss statement for the year 1943, to disclose to this Court that the earnings continued, during that year, at an even greater rate than in the preceding year and that there cannot presently be any doubt of its solvency.

CONCLUSION.

WHEREFORE respondent respectfully submits that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

I. E. FERGUSON,
77 W. Washington St.
Chicago, Illinois,

CHARLES W. STIEFEL, JR.,
77 W. Washington St.
Chicago, Illinois.

GEORGE R. MURRAY,
Callahan Building,
Dayton, Ohio,
Attorneys for Respondent.

[redacted]

INDEX

	Page
1. Introductory	1
2. The need for equitable relief	5
3. Necessary limitations and safeguards	13
Conclusion	17

CITATIONS

Cases:

Campbell v. *Anniston Office Bldg. Co.*, 73 F. (2d) 789	14
Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510	15
Denicke v. *Anglo California Nat. Bank*, 141 F. (2d) 285	6
Falvey v. *Foreman-State National Bank*, 101 F. (2d) 409, certiorari denied, 307 U. S. 632	14
First National Bank v. *Bryn Mawr Beach Building Corp.*, 365 Ill. 409	15
Hawes v. *Oakland*, 104 U. S. 450	5, 13
Jacobus v. *Diamond Soda Water Mfg. Co.*, 88 N. Y. S. 302	10
Kroger v. *Jaburg*, 231 App. Div. 641, N. Y. S. 387	9
Lebold v. *Inland Steel Co.*, 125 F. (2d) 369	10
Marine Harbor Properties v. *Manufacturers Trust Co.*, 317 U. S. 78	15
Miner v. *Belle Isle Ice Co.*, 93 Mich. 97, 52 N. W. 218	9
New England Coal & Coke Co. v. *Rutland R. R. Co.*, 143 F. (2d) 179	3, 9
Pepper v. *Litton*, 308 U. S. 295	9
Republic Service Corporation, S. E. C. Holding Company Act Release No. 3513, May 9, 1942	4
SEC v. *Fiscal Fund, Inc.*, 48 F. Supp. 712	9
Taylor v. *Standard Gas & Electric Co.*, 306 U. S. 307	9
Tower Hill-Connellsville Coke Co. v. *Piedmont Coal Co.*, 64 F. (2d) 817, certiorari denied, 290 U. S. 675	9
Whitney v. *Hazzard*, 18 S. D. 490, 101 N. W. 346	10
Whitten v. *Dabney*, 171 Cal. 621, 154 P. 312	6
Zeitinger v. *Hargadine-McKittrick Dry Goods Co.*, 244 Fed. 719, certiorari denied, 245 U. S. 667	3

Statutes:

Bankruptcy Act:	
Chapter X	3
Sec. 111	15
Sec. 156	15
Public Utility Holding Company Act of 1935, Section 11	3

625463 - 45 - 1

Miscellaneous:

	Page
Berle and Means, *The Modern Corporation and Private Property*	6
Bonbright and Means, *The Holding Company*	6
Katz, *The Protection of Minority Bondholders in Foreclosure and Receivership*, 3 U. of Chi. Law Rev. 517 (1926)	15
Moore, *Bankruptcy Manual*, 1939, p. 542	7, 8
Note, 38 Mich. L. Rev. 96 (1939)	14
SEC Report on Protective and Reorganization Committees, Part I, 691–706	5
SEC Report on Protective and Reorganization Committees, Vol. VIII, pp. 10–22, 184, 185	6, 15
S. Doc. 173, 75th Cong., 3d sess., reprinted in Final Report and Recommendations of the T. N. E. C., p. 11	7
Senate and House Committee Reports on Chapter X	8
Simpson, *Fifty Years of Equity*, 50 Harv. L. Rev. 171 (1936)	5
T. N. E. C. Monograph No. 11, *Bureaucracy and Trusteeship in Large Corporations*	6
T. N. E. C. Monograph No. 29, *The Distribution of Ownership in the 200 Largest Non-Financial Corporations*	6
T. N. E. C. Monograph No. 30, *Survey of Shareholdings in 1710 Corporations with Securities Listed on a National Securities Exchange*	6

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 410

OWEN N. PRICE, TRUSTEE FOR BONDHOLDERS OF THE WESTERN TOOL & MANUFACTURING CO., ET AL., PETITIONERS

v.

JAMES G. GURNEY, INDIVIDUALLY AND ON BEHALF OF OTHER SHAREHOLDERS OF THE WESTERN TOOL & MANUFACTURING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION AMICUS CURIAE

1. *Introductory.*—The Securities and Exchange Commission, in the light of its statutory responsibilities in the administration of Chapter X of the Bankruptcy Act, presents this memorandum as *amicus curiae,* to express its views on the question of public importance presented in this case.[1] This

[1] The Commission did not participate in the reorganization proceeding in the district court or in the appeal in the court below.

question is whether under Chapter X stockholders may properly file a derivative petition for reorganization for and in the name of their corporation, upon allegations that reorganization is needed to preserve the stockholders' equity and that the board of directors has in bad faith failed and refused to institute such proceedings.

It is our position that Chapter X does not exclude exercise by the bankruptcy court of equitable jurisdiction to permit the filing of a stockholder's petition on behalf of his corporation where adequate showing is made that such action is necessary to protect the stockholders' equity from a clear breach of the fiduciary responsibilities owed by management. Clearly Chapter X does not give stockholders, as such, a direct or non-derivative right to institute proceedings.[2] However, we believe that a derivative right exists and that it can be adequately safeguarded against abuse by holding stockholders to the strict standards of the derivative action rule and by requiring a hearing, on notice to the corporation among others, before approval of the petition.

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[2] The specifications in the Act for the filing of voluntary petitions by the debtor, and involuntary petitions by creditors, clearly exclude the right of stockholders as such to file an involuntary petition. See the cases cited by petitioner (Br. p. 13). These cases do not seem pertinent to the question of the right to file a derivative petition.

We are aware of no authorities directly in point in the bankruptcy field,[3] but agree with the majority of the court below that since the Bankruptcy Act does not attempt to specify who shall act for the corporation in filing a petition, this is left to the applicable principles of general corporation law. Accordingly, we believe that the ordinary principles of the derivative action rule are applicable unless plainly inconsistent with the purposes or provisions of Chapter X.[4] With the safeguards

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[3] We do not regard the absence of precedents as negativing the possibility of a stockholder filing a derivative petition under Chapter X. Only under the reorganization sections of the Bankruptcy Act and then only if the corporation is merely unable to pay its debts as they mature, could a stockholder have a valid basis for filing a derivative petition. Since a petition based on insolvency in the bankruptcy sense concedes that stockholders have no equity, it is difficult to imagine a situation in which stockholders could claim an interest in having the corporation file either a petition for reorganization or a petition in bankruptcy based on that allegation. There may, however, be a basis for stockholders opposing on behalf of the corporation the filing of an involuntary petition. Such a right has been recognized under general equitable principles. See *Zeitinger* v. *Hardgardine-McKittrick Dry Goods Company*, 244 Fed. 799 (C. C. A. 8), certiorari denied 245 U. S. 667; *Cf. New England Coal & Coke Co.* v. *Rutland R. R. Co.*, 143 F. (2d) 179 (C. C. A. 2).

[4] In the different context of Section 11 of the Public Utility Holding Company Act of 1935, the Commission has held improper a stockholder's attempt to file derivatively on behalf of his corporation a plan under Section 11 (e) to comply with Section 11 (b). However, the effect of this holding is to leave the stockholder free to oppose plans filed by the company; and in default of a satisfactory voluntary plan, the stockholder may ultimately (dependent upon initia-

subsequently noted we believe no such inconsistency exists.

To the extent that our argument rests upon the reasoning of the majority of the court below we shall not restate it here. And, beause we are concerned with the broad aspects of the question presented, we express no views as to whether the petitioning stockholders in this case are entitled to the relief sought. On this aspect of the problem we believe it is sufficient to observe that the majority and minority of the court below agreed that the petitioning stockholders had alleged sufficient facts to support a complaint for equitable relief. Their difference was as to whether Chapter X is an appropriate vehicle to provide such relief. The parties on the petition for certiorari have argued at some length whether in fact grounds for equitable relief exist and also whether reorganization is possible. We have not concerned ourselves with either of these issues but have confined ourselves to the issue remaining on the assumption that the court either will refuse to examine the allegations of fraud and misconduct, or on examination will find them adequate, and on the further assumption that the question of the possibility of reorganization in Chapter X will be left for findings by the District Court in the event of affirm-

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tion of appropriate proceedings by the Commission) propose a plan which, if approved by the Commission, may be enforced by a district court under Section 11 (d). See *Republic Service Corporation*, Holding Company Act Release No. 3513, May 9, 1942.

ance of the decision of the Circuit Court of Appeals.

This memorandum is therefore limited to the discussion of two considerations: first, the relevance in the context of Chapter X of the traditional equitable principles under which stockholders are sometimes permitted to take legal action on behalf of their corporation, and second, the limitations and safeguards necessary to prevent possible abuse by stockholders of the right to file a derivative petition.

2. *The need for equitable relief.*—The derivative suit is an equitable device which, in effect, telescopes into a single proceeding the stockholder's equitable right to have a corporate claim, or defense, asserted against a third party, and the assertion of the corporation's claim or defense. To avoid the circuity of action and delay which would be incident to requiring a separate proceeding by the stockholder to have a receiver appointed or otherwise to displace the management, followed by another proceeding in which the corporate claim or defense is asserted, the complaining stockholder is permitted to act as a sort of self-appointed guardian *ad litem* for the corporation,[5] and thus to assert the corporate claim or defense directly against the third party—provided, of

[5] See *Hawes* v. *Oakland*, 104 U. S. 450; SEC Report on Protective and Reorganization Committees, Part I, 691–706; Simpson, *Fifty Years of Equity*, 50 Harv. L. Rev. 171, 190–191 (1936). For cases characterizing the complaining stock-

course, that certain requirements are met, which are, *inter alia,* designed to relieve the courts from having to settle mere disputes of business policy concerning corporate litigation.

The importance of this stockholder's right has been emphasized by the growth of the modern corporation, the increasingly widespread public ownership of stocks, and the development of voting trusts, holding companies, non-voting stocks, proxies, and other devices designed to separate stock ownership from corporate control.[6] These devices have generated conflicts of interest between stockholders and management, and have sometimes tended to make directors and officers more representative of powerful creditor groups than of their equitable cestuis que trust, the stockholders.[7]

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holder as a guardian *ad litem*, see *Whitten* v. *Dabney*, 171 Cal. 621, 630; 154 P. 312, 316; *Denicke* v. *Anglo California Nat. Bank*, 141 F. (2d) 285, 288 (C. C. A. 9).

[6] See Report on Protective and Reorganization Committees, Part VIII, pp. 184, 185; T. N. E. C. Monograph No. 29, *The Distribution of Ownership in the 200 Largest NonFinancial Corporations;* No. 30, *Survey of Shareholdings in 1710 Corporations with Securities Listed on a National Securities Exchange;* No. 11, *Bureaucracy and Trusteeship in Large Corporations;* Berle and Means, *The Modern Corporation and Private Property;* Bonbright and Means, *The Holding Company.*

[7] As the President stated in his Message to Congress of April 29, 1938—

"* * * industrial empire building, unfortunately, has evolved into banker control of industry. We oppose that.

"Such control does not offer safety for the investing public. Investment judgment requires the disinterested appraisal of

When the need arises for reorganization of the modern corporation, the divergence of the interests of management and stockholders may become acute, with unfortunate consequences to the widely scattered public stockholders. As one student of reorganization practice has stated:

> But to say that stockholders are represented by their directors in a reorganization is to forget that in reorganization "the corporate structure or entity * * * becomes diaphanous, and the stockholders emerge as the real parties in interest." It is no longer a matter of corporate business. It is a question of class against class, and a group struggle within a class. The directors were not elected to conduct such business. * * * practically it would seem that stockholders are often inadequately represented by directors and officers who may be bondholders, or associated with bondholders, or desire to be continued in office by the new stockholders. One example should illustrate this clearly. Under § 77B of the Bankruptcy Act the stockholders were given a great deal of power if insolvency was not found, or if the judge did not find that they would be unaffected by the plan. Would any one urge that the proper representatives in such a case should

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other people's management. It becomes blurred and distorted if it is combined with the conflicting duty of controlling the management it is supposed to judge." S. Doc. 173, 75th Cong., 3d Sess., reprinted in Final Report and Recommendations of the T. N. E. C., p. 11, at p. 13.

> be the directors who may honestly believe the corporation to be insolvent, and possibly not being more than nominal stockholders themselves, might have no further interest in protecting the rights of the stockholders? (Moore, *Bankruptcy Manual*, 1939, p. 542.)

The problems faced by public investors as a result of conflicting and overlapping interests as they impinge upon corporate management, indenture trustees and other fiduciaries have been a focal point of much of the recent federal legislation for the protection of investors, including the corporate reorganization provisions of the Bankruptcy Act. They have led, among other things, to express statutory provisions designed to eliminate conflicts of interest and provide for action by a disinterested trustee or by an administrative agency with affirmative responsibilities for representing interests of investors who may not otherwise be adequately represented.[8] These new remedies heve been fashioned largely because the traditional equitable remedies have proved inadequate to deal with the complexities of modern corporate organization. They were not, however, intended to eliminate the possibility of invoking traditional equitable remedies where in fact adapted to protection of the substantive rights involved. For, as this Court has stated, " 'courts of bankruptcy are essentially courts of equity, and

[8] See H. Rep. 1409, 75th Cong., 1st sess., pp. 37–38, 42–44, 47–48; S. Rep. 1916, 75th Cong., 3d sess., pp. 21, 22.

their proceedings inherently proceedings in equity' * * * at least in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applies the principles and rules of equity jurisprudence." *Pepper* v. *Litton,* 308 U. S. 295, 304; see *Taylor* v. *Standard Gas & Electric Company,* 306 U. S. 307, 322.[9]

The stockholders' derivative right serves as an instrument of self-help, which can appropriately be assimilated into the reorganization machinery if properly circumscribed by available safeguards against abuse. Just as stockholders have, under certain circumstances, the right to insist that the management institute proceedings to wind up their corporation (*Securities and Exchange Commission* v. *Fiscal Fund, Inc.,* 48 F. Supp. 712 (D. Del. 1943); *Kroger* v. *Jaburg,* 231 App. Div. 641, 248 N. Y. S. 387 (1st Dept. 1931); *Miner* v. *Belle Isle Ice Co.,* 93 Mich. 97, 53 N. W. 218 (1892). *Cf. Tower Hill-Connellsville Coke Co.* v. *Piedmont Coal Co.,* 64 F. (2d) 817 (C. C. A. 4), certiorari denied, 290 U. S. 675), so, as a corollary, in a proper case they would appear to have a right to demand that the management institute reorganization proceedings when the corporation is in need of financial rehabilitation. *Cf. New England Coal & Coke Co.* v. *Rutland R. R. Co.,* 143 F. (2d)

[9] In *Taylor* v. *Standard Gas & Electric Company,* the bankruptcy reorganization court employed its equitable powers to protect public preferred stockholders against the efforts of a creditor-management to effect an unfair plan.

179 (C. C. A. 2). If, in such a case, the management acts in collusion with dominant creditor interests, even to the point of assenting to a liquidation that will wipe out the stockholders' interests, stockholders may ask a court of equity to aid them to correct the management's fraud or bad faith. See *Lebold* v. *Inland Steel Co.*, 125 F. (2d) 369 (C. C. A. 7); *Jacobus* v. *Diamond Soda Water Mfg. Co.*, 88 N. Y. S. 302; *Whitney* v. *Hazzard*, 18 S. D. 490, 101 N. W. 346.

However, on the allegations of the present case, such a suit in equity would seem to be both inadequate and circuitous. If, as the stockholders allege, they have an equity which can be salvaged in a reorganization, and if also (as they must show to maintain their derivative proceeding) Chapter X is better adapted to salvaging their interest than the state court foreclosure proceeding, then they must ultimately invoke the jurisdiction of the bankruptcy court in order to obtain complete relief. A holding that they may not apply directly to the bankruptcy court by the filing of a derivative petition leaves as an alternative only a cumbersome and circuitous procedure. It would be necessary for them to obtain an injunction halting the dismembering of the corporation through further steps by way of foreclosure and to obtain a decree in the nature of a mandatory injunction requiring the directors to perform their fiduciary obligation by filing the traditional debtor reorgan-

ization petition under Chapter X. As a consequence, the necessary issues would have to be tried in two courts, the equity court and the bankruptcy court, and some of the same issues would have to be litigated in both courts. Thus, in the equity proceeding, the stockholders would have to establish (1) that reorganization is needed; (2) that they, the stockholders, have an equity in the corporation which is threatened with impairment or destruction by the action taken or acquiesced in by the board of directors (here surrender of the property to the bondholders); (3) that the decision of the management not to institute reorganization proceedings is motivated by fraud or bad faith rather than the exercise of business judgment; and (4) that the complaining stockholders have filed their suit in good faith and not for the purpose of harassing or otherwise injuring the corporation. If the stockholders sustain that burden in the equity court and in all the appellate courts to which the creditor-management interests might carry the litigation, they will then find themselves only at threshold of proceedings in the Chapter X court wherein sooner or later there must be a retrial of the first two issues, those as to the need for reorganization and as to the solvency or insolvency of the corporation.[10]

[10] The decision of the Chapter X court on the question of insolvency if made early in the proceeding, need not, and probably should not be, at this stage, the type of final determination which is conclusive at later stages of the proceeding by operation of Section 145.

The Bankruptcy court would determine these issues *de novo,* considering the condition of the corporation as of the time the reorganization petition is filed rather than the time when the decree was issued by the court of equity compelling the board of directors to file the petition. To limit stockholders to such expensive and dilatory procedure as their only protection from a creditor-dominated management would amount in practical effect to affording them no relief at all against inequitable deprivation of the protection designed to be afforded by Chapter X. Stockholders would thus be limited to whatever protection the state courts may afford against inequitable foreclosures. They would not obtain protection against the very inadequacies of the equity receivership as a vehicle for reorganization which led to the adoption of the bankruptcy reorganization statutes.

The Chapter X court has adequate facilities in the exercise of its statutory and inherent equitable powers to deal with all the issues that would be initially presented to an equity court in a stockholders' derivative suit. For the reasons we have suggested, it is consonant with the purposes of Chapter X that the equitable remedy of the stockholders' derivative suit should, in a proper case and subject to adequate safeguards, be made available in the form of a stockholders' derivative petition for reorganization.

3. *Necessary limitations and safeguards.*—We have adverted generally to abuses which might flow from extension of the stockholders' derivative remedy to the reorganization process. Since a decision in this case of first impression will, of course, be a guide to stockholders faced with similar problems in the future as well as to reorganization courts when they are presented with the problem, we desire to indicate what these potential abuses may be and how the reorganization courts can cope with them.

One traditional limitation upon the availability of derivative actions is that the courts will not concern themselves with what is nothing more than a dispute as to the business judgment of the management regarding the desirability of instituting an action or interposing a defense. *Hawes v. Oakland,* 104 U. S. 450, 460. This limitation is, of course, applicable to a derivative petition under Chapter X and we believe is given adequate recognition in the majority opinion of the court below (R. 120–122). It will be noted that the petitioning stockholders had shown both an alignment of the management with the interest of creditors and the pendency of uncontested foreclosure proceedings which would lead to a complete elimination of any stockholders' interest. When to this is added the further allegation that the stockholders had an equity which could be salvaged through the processes of Chapter X, the

stockholders present the typical issue which courts of equity have always recognized as a basis for a derivative suit—a clear breach of duty to the detriment of the corporation and the petitioning stockholders' interest therein.[11]

Recognition in proper circumstances of the right of stockholders to invoke Chapter X on behalf of their corporation does not mean that this relief will be available on insubstantial grounds. In fact, the basis for a derivative petition filed by a stockholder would necessarily be even more limited than the basis for the filing of an involuntary petition by creditors. Thus, the stockholder must allege the existence of an equity; otherwise he has no standing to complain of the failure of his management to file a petition.[12] This precludes the filing of a derivative stockholders' petition based upon allegations of insolvency in the bankruptcy sense where the corporation is able to meet maturing obligations. The further necessity of meeting the "good faith" requirement obliges the petitioning stockholder to satisfy the reorganization judge that there is a reasonable possibility of reorganization and if a prior proceeding is pending that it will not best

[11] As stated above, we do not address ourselves to the arguments of petitioner and respondent as to whether these further allegations were or can be sustained.

[12] *Falvey* v. *Foreman-State National Bank*, 101 F. (2d) 409 (C. C. A. 7), certiorari denied, 307 U. S. 632; *Campbell* v. *Anniston Office Bldg. Co.*, 73 F. (2d) 789 (C. C. A. 5); and see Note, 38 Mich L. Rev. 96 (1939).

subserve the interests of stockholders.[13] In the light of these requirements there is little danger of improvident approval of derivative petitions, provided a preliminary hearing is held.

We believe that a preliminary hearing is necessary in every case before the court approves a

[13] *Marine Harbor Properties* v. *Manufacturers Trust Co.*, 317 U. S. 78. The petitioners cite the *Marine Harbor* case as conclusive against the allowance of a petition here. However, the traditional state court equity foreclosure proceeding is a far less adequate vehicle for the effectuation of a "fair and equitable" plan of reorganization than the New York Schackno Act proceeding which this Court considered in that case. Added to the question of whether the foreclosure court has power to supervise the plan is the problem of raising cash to pay dissenters—a problem which has resulted in low bids and a judicial attempt to reconcile considerations of fairness with the necessities of reorganizers by first developing an "upset price" technique and then acquiescing in any price which is not so inadequate as to shock the conscience of the court. Finally, there are the further inadequacies which result from insider control of the reorganization machinery. See S. E. C. Report on Protective and Reorganization Committees, Part VIII, pp. 10–22; Katz, *The Protection of Minority Bondholders in Foreclosure and Receivership*, 3 U. of Chi. Law Rev. 517 (1936).

Stockholders filing a derivative petition for reorganization under Chapter X, where, as here, the directors are not contesting a state court foreclosure proceeding, may well complain that the rudimentary valuation technique used in the state court proceeding to determine the upset price may result in the elimination of an equity which could be salvaged by application of the valuation procedure employed in Chapter X. Cf. *First National Bank* v. *Bryn Mawr Beach Building Corp.*, 365 Ill. 409, 425, 6 N.E. (2d) 654, 662 (1937) with *Consolidated Rock Products Company* v. *DuBois*, 312 U. S. 510, 525–526.

derivative petition. This is a procedural precaution which is not articulated in the opinions of the court below and which was not followed by the district court in the instant case. Where stockholders assert the right to file a voluntary petition derivatively on behalf of their corporation, their action in so doing is of course not comparable to the filing of such a petition by the management accompanied as it would be by the usual indicia of at least prima facie authority to act for the corporation. In the latter cases *ex parte* approval of the petition is appropriate and is authorized by Section 141 provided the judge is "satisfied" that the petition is duly filed. Since, under Section 156, approval of the petition may be accompanied by immediate appointment of a trustee, and must be so accompanied if the indebtedness exceeds $250,000, such *ex parte* procedure seems manifestly inappropriate in the case of a derivative petition, which of necessity shows on its face the existence of a controversy between the stockholders and the management and thereby presents an issue requiring answer and hearing before taking the drastic step of approving the petition.

In the instant case the existence of foreclosure proceedings prevented the mere approval of the petition from having any material effect upon the credit of the debtor and, the indebtedness being less than $250,000, the court did not see fit to

appoint a trustee at the time when the derivative petition was first approved. Nevertheless, to avoid the possibility of injurious consequences from the improvident approval of a derivative petition upon a mere *ex parte* application, we believe that the proper practice would be to allow opportunity for answer and hearing in every case before approval of such a petition is granted.[14]

CONCLUSION

It is submitted that in appropriate circumstances, and subject to proper safeguards, a peti-

[14] This, of course, would not exclude an *ex parte* restraining order or even in extraordinary circumstances the *ex parte* appointment of a receiver to prevent irreparable injury before the court had an opportunity to determine the propriety of approving the petition. In this instance the petition was filed in the corporate name and signed in the name of the corporation by respondent Gurney, but was accompanied by an affidavit setting forth the reasons why respondent as a stockholder of the debtor claimed a derivative right to file on its behalf. (R. 1–9). We believe it would have been better practice for the petitioning stockholder to have filed his petition in such form that it would appear on the face of the petition rather than the supporting affidavit, that the petition was filed as a derivative action. However, the court was not in fact misled. Statements of counsel at the *ex parte* hearing called the court's attention to the facts in the affidavit indicating that "the corporation as such had taken no action authorizing the filing of the petition." (R. 92). At the conclusion of the *ex parte* hearing, the judge approved the petition and issued an injunction, although expressly stating that he was leaving open the issue as to the right of the stockholder to file the petition and other pertinent questions.

tion for reorganization under Chapter X may be filed on behalf of a debtor corporation by a stockholder asserting a derivative right.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROGER S. FOSTER,
Solicitor,
MILTON V. FREEMAN,
Assistant Solicitor,
THEODORE L. THAU,
Special Counsel,
Securities and Exchange Commission.
JANUARY 1945.

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No. 410

Supreme Court of the United States

October Term, 1944

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and ROY MASSENA, E. J. PRICE, W. D. HOLLISTER and W. T. KETTERING, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.

Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co., and THE WESTERN TOOL & MANUFACTURING COMPANY, a Corporation.

Respondents.

PETITIONERS' ANSWER BRIEF TO MEMORANDUM OF COUNSEL FOR SECURITIES AND EXCHANGE COMMISSION

WM. W. KEIFER,
HORACE S. KEIFER,
512 M & M Building,
Springfield, Ohio,
Counsel for Petitioners.

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Respondents.

PETITIONERS' ANSWER BRIEF TO MEMORANDUM OF COUNSEL FOR SECURITIES AND EXCHANGE COMMISSION.

This Brief is filed by leave of court in answer to the Memorandum of Counsel for Securities and Exchange Commission filed January 12, 1945, the day of the oral argument.

We note in the first place (pp. 4, 14-15) that Counsel for the SEC are concerned with only one question in this case and that is whether stockholders can under Chapter X file a petition "for and in the name of their corporation" for reorganization as a derivative right. Thus, if SEC Counsel are correct, the questions of fact arising as to (1) whether there was bad faith or wrongful conduct on the part of the directors, (2) whether there was or is reasonable prospect of a reorganization, and (3) whether the

prior pending proceeding in the state court is not sufficient, are still to be determined.

DOCTRINE OF DERIVATIVE ACTIONS NOT APPLICABLE.

We of course agree with much in Counsel's Memorandum, first as to the nature and use of derivative actions and secondly as to the need of protection for the public (scattered numerous stockholders) against crimes of management and also that SEC has rendered valuable service in the latter field. This is an able and interesting discussion but not applicable here to this small corporation ($112,050.00 par value stock, most if not all of the value of which has been lost, $73,100.00 par value of bonds, and *no general creditors*).

That it is not applicable is clear in view of the fact that Chapter X was enacted for the reorganization of "corporations with complicated debt structures and many stockholders" (*Sec. & Ex. Com.* v. *U. S. R. & Co.*, 310 U. S. (434) 447.) and not for small concerns whose owners, (bondholders and stockholders), can and must adjust their respective rights by dealing directly with each other. Chapter X does not mean that one class of investors is to be favored over another and stipulated rights changed. The stockholders here have had ample opportunity over a long period of time to protect themselves and the bondholders have over the same long period of time deferred their rights to realize on their mortgage security, (the first default having been in 1923 or earlier and the last maturity date of the principal of the bonds being in 1931, R. 52). Why should now the bondholders be penalized by further delay, reorganization machinery and expense, when the only possible result is the sale of the mortgaged property to satisfy the debt? Of course, the stockholders through the corporation may redeem the property by directly paying or settling with the holders of the

mortgage, but this calls for no reorganization under Chapter X.

Counsel for the SEC (p. 3 note 4) are ingenuous enough to admit that the SEC had refused a stockholder's attempt to file derivatively on behalf of the corporation a plan under Sec. 11 (e) of the Public Utilities Holding Act of 1935 for the divestment of control, etc. It will be noted that this process is in fact a reorganization of a corporation, perhaps a drastic one. Therefore, such a holding is rather definite authority against the proposition of Counsel in reference to Chapter X.

REORGANIZATION NOT THE SAME AS LIQUIDATION.

Counsel argue (p. 9) that since stockholders have, under certain circumstances, the right to insist that the management institute proceedings to wind up their corporation, as a corollary, they have a right to demand that the management institute reorganization proceedings when the corporation is in need of financial rehabilitation. No doubt the directors of a corporation have a legal duty to wind up a corporation when the objects of a corporation have failed so that it no longer is able to continue operation, but we submit that when the question of continuing or liquidating is whether it is wise or good policy to continue, then the directors will exercise business judgment and cannot be forced by the stockholders to take either course. This relegates us to the original question whether these directors had a legal duty to petition for reorganization.

MANDATORY INJUNCTION.

Further characterizing the claim that directors may be required to file a reorganization proceeding is the statement (p. 10) that in case a derivative petition cannot be filed a

stockholder would be forced to secure a mandatory injunction against the directors. A suit for such mandatory injunction we submit would be anomalous and unheard of.

WHO CAN ACT FOR CORPORATION.

Counsel for SEC seem to argue (p. 3) that since Chapter X does not specify who shall act for the corporation in filing the petition, therefore a stockholder may. It is of course left to the rule of general corporation law and that is, as we pointed out in our Brief, (pp. 13-14), that only the directors can authorize such proceeding. And this court has recently held, (*Voeller* v. *Neilston Warehouse Co.* 311 U. S. 531, 536-7), as to an Ohio corporation that the corporation acts through its directors and that the stockholders entrust the affairs of the corporation to the directors.

AS TO LIMITATIONS AND SAFEGUARDS.

It is rather significant that Counsel, in proposing the plan for stockholders to file a petition under Chapter X, admit that there should be "limitations and safeguards necessary to prevent possible abuse by stockholders of the right." (pp. 9, 13). Passing for the present that it is judicial legislation that is thus proposed, we venture to suggest that this clearly shows no such right exists under the statute. If Counsel recognize that definite "limitations and safeguards" must be applied, it is apparent that legislation is required to create the right as well as impose the limitations and safeguards.

We note here that Counsel (p. 14) include among the "limitations and safeguards" the requirement (of Sec. 146 (3) that there be a reasonable expectation of effecting a reorganization and (Sec. 146 (4)) that a prior pending proceeding will not best subserve. This recognition fully con-

firms our contention that when it appears that these two requirements are not met the proceeding must fail.

(We take it (p. 17 Note 14) that Counsel are not in harmony with the Marine Harbor case. An attempt is made to show that appraisement and sale of property in a foreclosure case are not adequate and that the Marine Harbor case applied only where the prior pending case was under a New York statute. The report of that case does not so indicate.)

PRELIMINARY HEARING OF DERIVATIVE PETITION TO BE REQUIRED.

A significant further safeguard suggested by counsel (pp. 15-16) is that "a preliminary hearing is necessary in every case before the court approves a derivative petition." The statute has provided for a preliminary hearing before a petition is approved (Secs. 141-144) and Counsel propose another preliminary hearing to determine whether a derivative petition is proper. Thus there is to be a hearing preliminary to a preliminary hearing. The further suggestion is made (p. 17) that there be opportunity for answer and hearing on this question. This of course would be different from and anterior to the answer and hearing provided for in Secs. 136-144. This likewise is new law and procedure. Such contention only emphasizes our claim that the statute does not provide for or contemplate any such procedure.

Finally, we cannot agree with some expressions in the SEC Memorandum. "Dismembering of a corporation through further steps by way of foreclosure" (p. 10) and "inequitable foreclosures" (p. 12) are expressions that attempt to characterize a foreclosure suit as something very wicked. A suit to subject mortgaged property to the pay-

ment of the debt secured thereby is a suit in equity and therefore would be an "inequitable" equity, according to Counsel's characterization. We see nothing unrighteous or inequitable in applying pledged property to the payment of an obligation incurred and induced on the strength of the pledge, especially if the holder of the obligation has held off enforcing his claim for twenty years.

In all the contentions for the reorganization proceeding the rights of the mortgage bondholders are completely ignored.

CONCLUSION.

We submit there is no room in Chapter X of the Bankruptcy Act for a derivative petition. It would be inconsistent with Sec. 126 and require procedure and hearings nowhere provided for. If there are arguments in favor of such law and procedure they should be submitted to Congress and not to the courts.

But if there is a right to file a derivative petition, still no case has been made here on the facts, and, what is even more clear, "good faith" within the meaning of Sec. 146 (3) and (4), is lacking. That it is unreasonble to expect a plan of reorganization to be effected cannot be questioned, nor that the prior pending proceeding will not best subserve. When absence of "good faith" appears at any stage, the proceeding should be dismissed.

Respectfully submitted,

WM. W. KEIFER,
HORACE S. KEIFER,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

IN THE MATTER OF PROPOSED REORGANIZATION OF THE WESTERN TOOL & MANUFACTURING COMPANY, A CORPORATION,
Debtor.

OWEN N. PRICE, Trustee for Bondholders of The Western Tool & Manufacturing Co., and Roy Massena, E. J. Price, W. D. Hollister and W. T. Kettering, Bondholders' Protective Committee for Holders of Bonds of The Western Tool & Manufacturing Co.,
Petitioners,

vs.

JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co.,
Respondent.

Petition for Rehearing.

CHARLES W. STIEFEL, JR.,
77 W. Washington Street,
Chicago, Illinois,

GEORGE R. MURRAY,
Callahan Building,
Dayton, Ohio,
Attorneys for Respondent.

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PAGE

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In re Fidelity Assurance Association, 42 Fed. Sup. 973 5

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Jensen v. Republic Steel Corporation, 32 Ohio Law Abstract 29 3

Larwill v. Burke, 19 O.C.C. 449 3

Ogden v. Gilt Edge Consolidated Mines Co., 225 Fed. 723 4

Pepper v. Litton, 308 U. S. 295 2

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United States Lines v. United States Lines, 96 Fed. 2nd 148 4

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Statutes Cited.

Bankruptcy Act, Sec. 126, 11 U.S.C.A. 526 2

Bankruptcy Act, Sec. 146, 11 U.S.C.A. 546 5

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JAMES G. GURNEY, Individually and on Behalf of Other Shareholders of The Western Tool & Manufacturing Co.,
Respondent.

Petition for Rehearing.

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Respondent respectfully submits that a rehearing should be granted in this cause because, unquestionably, the result of the Court's opinion is to permit substance to give way to form, fraud to prevail and to allow technical considerations to prevent the doing of substantial justice, the very

consequences which this Court denounced in the case of *Pepper* v. *Litton*, 308 U. S. 295.

The narrow construction placed upon Chapter X of the Bankruptcy Act, whereby the stockholders of a corporation in need of the relief provided by the Act but which its antagomistic directors refuse to seek, are relegated to a state equity court proceeding to require the directors to seek such relief, defeats the very purposes for which the reorganization statute was enacted and for the accomplishment of which jurisdiction was conferred upon the federal courts alone.

The purpose of the Chandler Act was to grant relief to distressed corporations. To postpone the aid afforded by that Act for the period required to litigate, in the trial and reviewing courts of a state, the same questions which would again have to be determined by the federal bankruptcy court, would be, for all practical purposes, a denial of relief to the corporation. Such delays would, in by far the majority of cases, result in the loss of the stockholders' equity value by lapse of time and the hazards of management by a receiver incident to such litigation. When the stockholder had finally succeeded in the state court, not only would the burden of prosecuting the reorganization proceedings still fall upon him, because of the antagonism of the directors, but he would be required again to prove in the bankruptcy court (as the Security and Exchange Commission pointed out in its memorandum page 11), (1) that reorganization is needed, (2) that the stockholders have an equity which is threatened with impairment or destruction by the action of the directors and (3) that the stockholders have filed their application in good faith.

Neither in Section 126 of Chapter X, nor elsewhere, did Congress provide the internal procedure which a corporation must follow before it may seek relief under that

Chapter. Except as required by the instant decision of this honorable Court, there is no requirement created that a corporation can seek such relief *only* after action of its board of directors.

In this case the respondent advanced two contentions: One, that the directors are antagonistic and fraudulently refuse to act, the other, that the corporation is without a board of directors which can act for it. This Court has held, with respect to the first contention, that the federal court can grant no relief under Chapter X because the directors have refused to take formal action to seek that relief. This holding was based upon the extremely narrow ground that, under the Ohio corporation statute, a corporation's powers are vested in its board of directors. Wholly ignored are the decisions of the Ohio courts that when the actions of the directors of a corporation are so motivated, the stockholders, themselves, are empowered to institute legal proceedings, in behalf of the corporation, to preserve its assets. *Henry* v. *Jeanes, et al.*, 47 O. S. 116; *Godin* v. *Cincinnati & M. Canal Company*, 18 O. S. 169; *Buckeye Garage Company* v. *Caldwell*, 18 C. C. (N.S.) 429 (Ohio); *Jensen* v. *Republic Steel Corporation*, 32 Ohio Law Abstract 29; *Garage & Sales Co.* v. *Caldwell*, 18 O. C. C. (N.S.) 429; *Larwill* v. *Burke*, 19 O. C. C. 449 (aff. in 66 O. S. 683).

Whether it is a misnomer to designate such proceeding a derivative action because it is not the assertion of a corporate defense against a third party's claim nor the seeking of relief against a third party, would not seem to be determinative. It may well be said, however, that a Chapter X proceeding is an action by a corporation against its creditors for the readjustment of their claims and rights *inter se*. But whatever it may be termed, it remains an action to obtain the relief provided by the Bankruptcy Act and to preserve the corporation as a going concern. The federal bankruptcy courts have, in

numerous cases, exercised their equitable powers to afford shareholders relief where the directors refused to seek it or were actively antagonistic to the corporate interests. *In Re Beaver Cotton Mills*, 275 Fed. 498; *Ogden* v. *Gilt Edge Consolidated Mines Co.*, 225 Fed. 723; *In Re Dressler Producing Co.*, 262 Fed. 257; *Zeitinger* v. *Hargadine-McKittrick Dry Goods Co.*, 244 Fed. 719; *Whittiker* v. *Brictson Mfg. Co.*, 43 Fed. (2nd) 485; *United States Lines* v. *United States Lines*, 96 Fed. (2nd) 148.

This Court itself has held that to warrant the exercise of a court's equitable powers in behalf of corporate stockholders, the attitude of the directors need not be sinister but may be sincere but it is enough if the attitude is antagonistic to the company's interest. *Delaware & Hudson Co.* v. *Albany & Susquehana R. R. Co.*, 213 U. S. 435, 451.

Respondent respectfully submits that the fallacy is apparent in reasoning that: (1) before stockholders may be "allowed to put their corporation into bankruptcy, they must present credentials to the bankruptcy court showing their authority"; (2) whether they have such authority is dependent upon local law; (3) local law vests the powers of the corporation in its board of directors except where the directors are antagonistic and refuse to act, in which case the stockholders may exercise the powers of the corporation in its behalf; (4) the directors have refused to act and are admittedly antagonistic; *ergo* the stockholders cannot act on behalf of the corporation because the directors are vested with the powers of management. Yet such is the decision in this case.

The second contention of respondent, that the corporation here involved is without a board of directors who could act for it, was not decided by this honorable Court.

The consequence of the instant decision is that a corporation lacking, for whatever cause, a *de jure* board of directors, would be barred from relief under Chapter X,

for a state court could not appoint directors for it and, as in the instance case, where the majority of the stock is held by antagonistic directors as voting trustees, a state court proceeding would result only in the dissolution of the corporation instead of its preservation.

Further, it is respondent's contention that a proceeding such as respondent's, does not require the federal bankruptcy court to determine any question which it is not otherwise required to determine under Chapter X.

Section 146 (11 U.S.C.A. 546) requires the bankruptcy court to determine whether the petition is filed in good faith. It cannot be gainsayed that one of the questions which must be considered and decided in reaching that determination is whether the corporation is properly before the court. If a corporation filed a voluntary petition for reorganization and a creditor sought its dismissal upon the ground that the corporation lacked a *de jure* board of directors, or that the directors' meeting, at which the filing of the petition was approved, had been illegally held, would the bankruptcy court be without jurisdiction to determine that question? (Cf. *In Re Mississippi Valley Utilities Corporation*, 2 Fed. Sup. 995; *In Re Fidelity Assurance Association*, 42 Fed. Sup. 973, 983. Under such circumstances could the bankruptcy court do nothing but deny relief to the corporation until a state court had determined the legality of the election of directors or of such meeting? To so hold is to abandon the principles of equity to embrace formalism.

To determine whether the corporation is properly before the court the legal principles involved do not vary because that issue is presented by a creditor rather than, as here, by a stockholder. To find, pursuant to Section 146, that the petition is filed in good faith, requires a determination that the corporation is properly before the bankruptcy court and necessarily, therefore, the bank-

ruptcy court is empowered to determine it. To hold otherwise is to discover a prohibition in the Bankruptcy Act which does not, in fact, exist. To place, by judicial interpretation, such a limitation upon the power of the court is not only a negation of the statutory purpose but is directly contrary to this Court's decision in *Taylor* v. *Standard Gas Co.*, 306 U. S. 307, 322, that equitable principles will be applied in a reorganization proceeding and, if necessary to prevent injustice, the corporate entity will be disregarded.

We respectfully submit that for the reasons above stated a rehearing should be granted and the decision of the Circuit Court of Appeals affrmed.

Respectfully submitted,

CHARLES W. STIEFEL, JR.,
77 W. Washington Street,
Chicago, Illinois;

GEORGE R. MURRAY,
Callahan Building,
Dayton, Ohio,
Attorneys for Respondent.

I, Charles W. Stiefel, Jr., one of the attorneys for respondent in the above cause, hereby certify that the foregoing petition for rehearing is filed in good faith and not for purpose of delay.

CHARLES W. STIEFEL, JR.

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JAMES G. GURNEY, Individually, etc.,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING

The Petition for Rehearing is based simply on the claim that this Court was wrong in the decision and the opinion erroneous in argument. The burden of counsel's complaint of the decision is that it is an "extremely narrow" construction of the law. We do not undertake to justify the opinion, for it justifies itself, nor do we presume to add to or improve on the argument.

It is said that decisions of Ohio Courts hold that when directors are antagonistic and fraudulently refuse to act "the stockholders, themselves, are empowered to institute legal proceedings, in behalf of the corporation, to preserve its assets." These decisions only hold that in certain cir-

cumstances stockholders, when the directors refuse to act, may themselves sue or defend on behalf of the corporation to preserve assets or rights. A reorganization proceeding is not to preserve assets or rights of the corporation. It is not an action by the corporation against its creditors or stockholders. No relief is asked nor can be asked for the corporation itself. It is only for and on behalf of the creditors and stockholders.

The failure of stockholders to attend an annual meeting, resulting in a failure to elect directors, cannot of itself create a power in stockholders to act for the corporation. The result of the failure to elect is simply that the old board of directors holds over and there is at least a *de facto* board. The directors in holding over are really *de jure* directors since directors hold office until successors are elected.

We might mention that there are other reasons for reversal of the judgment of the Circuit Court of Appeals than the one passed upon by this Court. These other reasons, while decisive in themselves, were not important after this Court decided the stockholder had no right, under the statute, to file the petition. However, we mention these other points and refer to our briefs on file for reasons in support of same:

1. Neither the corporation nor the directors had any legal duty to file a petition under Chapter X, that being a matter of business judgment. (Brief 24-5, Reply Brief in support of Certiorari 3.) (This point has not been answered or referred to in Respondent's Briefs.)

2. The record shows no misconduct on the part of the directors. (Brief 16-23, 25, Reply Brief in support of Certiorari 2-4.) If there was no legal election of directors, that imposed no duty on directors to file a petition. The record

shows no real controversy about the rate of interest. (Brief 22-3.) At any rate that question was involved in, decided and therefore conclusively adjudicated in the foreclosure case with no intervention on the part of the Respondent. (Brief 23-4, Reply Brief on Merits 3.) The laches of Respondent over a long period of time, particularly during the pendency of the foreclosure suit, prevents any claim thereafter. (Brief 24, Reply Brief in support of Certiorari 6.)

> (We might here suggest that it does appear in the record that the Respondent failed to intervene in the foreclosure proceedings, although having ample notice thereof, except to file a motion to set aside the judgment. (Record pp. 21, 32, 38-9.) Although it does not appear in the record, that motion was denied after the hearing in the District Court and no appeal was taken from that ruling of the state court.)

3. There was and is no reasonable expectation of reorganization under Chapter X because all creditors are definitely opposed. (Brief 27-31, Reply Brief in support of Certiorari 2.)

4. It was not shown that the prior pending proceeding denies to the stockholders in a substantial particular some benefit which Chapter X affords. (Brief 31-2.)

5. The record shows that the corporation was not solvent and therefore stockholders are not interested. (Brief 26-7, Reply Brief in support of Certiorari 7, Reply Brief on Merits 4.)

We note that the opinion mentions that the Respondent may have a meritorious case for relief. We know, of course, that the Court has not examined that matter, but we call attention to the fact that the record shows an honest and

generous management of this Company since 1923 by directors chosen as authorized by the stockholders. The only objection to their conduct is that they were using assets to pay a debt secured by mortgage upon those assets. This policy is denounced as "draining off" the earnings. We suggest they were applied where they belonged and in accordance with the business policy adopted by the directors.

Respectfully submitted,

WM. W. KEIFER,
HORACE S. KEIFER,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 410.—October Term, 1944.

Owen N. Price, Trustee for Bondholders of the Western Tool & Manufacturing Co., et al., Petitioners, *vs.* James G. Gurney, Individually and on Behalf of Other Shareholders of the Western Tool & Manufacturing Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 5, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

The Western Tool & Manufacturing Co. is an Ohio corporation. It has outstanding some 1100 shares of stock and also bonds which total in principal amount $73,000 with large arrearages of interest. Some twenty years ago, following a default in payment of interest on the bonds, more than 50 per cent of the shares of stock were placed in a voting trust, the voting trustees being designated by the bondholders. The bonds were deposited with a bondholders' committee. The voting trustees were members of the bondholders' committee; and some of the voting trustees were also directors and officers of the company. Since the voting trust was formed the bondholders have been in control of the company. Directors have been elected by the voting trustees. In 1942 the trustee under the mortgage deed of trust filed a petition to foreclose the lien of the bondholders in an Ohio court. The court appointed one of the voting trustees receiver; and he has operated the company as a going concern since that time. The company filed its answer in the foreclosure proceeding, admitting the allegations of the bill and consenting to the appointment of a receiver. Thereafter a judgment was entered on the mortgage for some $134,000. Respondent acting on behalf of himself and other holders of shares or of voting trust receipts moved to set the judgment of the state court aside. We are told that that motion was denied. It does not appear

whether there was an appeal from that denial or whether respondent sought to intervene in the foreclosure proceedings. Respondent as owner of 7 shares of stock and as agent for owners of some 675 shares (including certain shares deposited under the voting trust) also filed a petition in the name of Western Tool & Manufacturing Co. in the District Court asking that the company be given relief under Chapter X of the Bankruptcy Act. 52 Stat. 883, 11 U. S. C. § 501. The petition stated, among other things, that the value of the assets of the company was greatly in excess of the indebtedness and that that value would be lost to the stockholders in the foreclosure action. Respondent accompanied the petition with an affidavit which stated that an unsuccessful attempt had been made to have the corporation file the petition. The affidavit set forth rather serious charges against the management of the company. It alleged that the directors were unlawfully elected and that the corporation was without a *de jure* board. It alleged that certain of the directors were occupying conflicting and inconsistent fiduciary positions, i. e. as members of the committee their fiduciary responsibility was to the bondholders, as voting trustees their fiduciary duties were to the depositing stockholders, as directors and officers their fiduciary obligation was to all the stockholders, depositing and non-depositing. It charged them with acts of mismanagement, with dissipation of the assets of the company, and with management of the company solely for the benefit of the bondholders and against the interests of the stockholders. It alleged that the voting trust was illegal and void and was no longer in effect since it had by its terms expired. And it asserted that the only way in which the value of the stockholders' equity in the company could be preserved was by reorganization in bankruptcy.

The District Court first approved the petition as properly filed. Later the bondholders' committee and the corporation filed motions to dismiss the petition on the grounds, among others, that the board of directors of the company had not authorized it. A hearing was held, following which the District Court dismissed the petition. The Circuit Court of Appeals reversed, one judge dissenting. 142 F. 2d 404. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Bankruptcy Act.

Chapter X provides in § 126 that

"A corporation, or three or more creditors who have claims against a corporation or its property amounting in the aggregate to $5,000 or over, liquidated as to amount and not contingent as to liability, or an indenture trustee where the securities outstanding under the indenture are liquidated as to amount and not contingent as to liability, may, if no other petition by or against such corporation is pending under this chapter, file a petition under this chapter."

A creditor is defined in § 106(4) as the holder of any "claim". A claim is defined in § 106(1) so as to exclude stock. And a petition is defined as one filed under Chapter X by a debtor, creditors, or indenture trustee. § 106(9). It is therefore apparent that Congress has not given to stockholders the right to file petitions under Chapter X. The absence of that right is emphasized when we turn to other provisions of the chapter which define the rights of stockholders in these reorganization proceedings. When a debtor is continued in possession, a plan may be filed "by any stockholder, if the debtor is not found to be insolvent." § 170(3). Any stockholder has the right to be heard "on all matters arising in a proceeding under this chapter." § 206. And detailed provisions are included for the protection of such equity as the stockholders may have in the business. See for example § 179, § 180, § 196, § 197, § 216, § 221. Thus the rights which the stockholders are granted by the Act arise after the proceedings have been instituted. Thereafter they need not be represented solely by the debtor corporation. They may appear in their own right. Indeed, the Act contemplates their participation in the proceedings for the protection of such equity as they may have. But the initiation of the proceedings, like the run of corporate activities, is left to the corporation itself, i. e. to those who have the power of management.

These principles are not seriously questioned. And respondents make no pretense of saying that they in fact have the power of management over this Ohio corporation or that § 8623-55 of Ohio's General Corporation Act which vests the management of Ohio corporations in the board of directors[1] is inapplicable here.

[1] That section reads in part as follows:

"All the capacity of a corporation shall be vested in and all its authority, except as otherwise provided in this act or in the articles in regard to action required to be taken, authorized or approved by shareholders, shall be exercised by a board of directors of not less than three persons, which shall manage and conduct the business of the corporation."

Their theory rather is that the directors have breached their trust and have caused the corporation to commit acts which are confiscatory of the stockholders' interests, that the corporation has a defense against or a remedy in alleviation of the foreclosure action which the directors refuse to invoke, and that therefore the stockholders under the familiar rules governing derivative actions (*Dodge* v. *Woolsey*, 18 How. 331; *Davenport* v. *Dows*, 18 Wall. 626; *Hawes* v. *Oakland*, 104 U. S. 450) may proceed on behalf of the corporation. That was the view which prevailed in the Circuit Court of Appeals. But we do not think it stands analysis.

There is a misconception running through the presentation of this case which should be noted at the outset. It is a misnomer to speak of the filing of the petition on behalf of the corporation as a derivative action. A derivative action is a suit by a shareholder to enforce a corporate cause of action. The corporation is a necessary party to the suit. And the relief which is granted is a judgment against a third person in favor of the corporation. That is the rule in Ohio as well as elsewhere. 10 Ohio Juris. §§ 244 *et seq.*; *Dodge* v. *Woolsey*, *supra*; *Davenport* v. *Dows*, *supra*; *Hill* v. *Murphy*, 212 Mass. 1; *Groel* v. *United Electric Co.*, 70 N. J. Eq. 616; *Continental Securities Co.* v. *Belmont*, 206 N. Y. 7. Similarly if a corporation has a defense to an action against it and is not asserting it, a stockholder may intervene and defend on behalf of the corporation. 10 Ohio Juris. § 257; *Eggers* v. *National Radio Co.*, 208 Cal. 308; *Fitzwater* v. *National Bank*, 62 Kan. 163. Moreover, equity has evolved numerous remedies to protect not only the rights of the corporation but the interests of the stockholders as such against various acts of mismanagement. See 10 Ohio Juris. §§ 260 *et seq.*; Berle, Studies in the Law of Corporation Finance (1928). But respondents have not pursued either course. The petition which they have filed with the bankruptcy court is not a suit to enforce or protect a corporate right. Nor is it a suit to protect the interests of respondents as stockholders. Yet if it were either one, the federal District Court could not entertain it. No diversity of citizenship is shown and no other basis of federal jurisdiction is apparent. The question therefore is whether the bankruptcy court as an incident of its bankruptcy powers can give respondents the relief which, if their charges are taken as true, they might obtain in another forum. We do not think it can.

The District Court in passing on petitions filed by corporations under Chapter X must of course determine whether they are filed by those who have authority so to act. In absence of federal incorporation, that authority finds its source in local law. If the District Court finds that those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, it has no alternative but to dismiss the petition. It is not enough that those who seek to speak for the corporation may have the right to obtain that authority. ~~Congress has not given the bankruptcy court power over the affairs of a corporation prior to approval of the petition.~~ The District Court in the exercise of its diversity jurisdiction would of course have the power to enforce derivative actions,[2] to make faithless directors account, and the like, where local law permits. But under the Bankruptcy Act the power of the court to shift the management of a corporation from one group to another, to settle intracorporate disputes, and to adjust intracorporate claims is strictly limited to those situations where a petition has been approved. Thus § 156 provides for the displacement of the management and the appointment of a disinterested trustee[3] in case of certain companies after approval of the petition. In other situations the court may continue the debtor in possession. § 156. The plan must include provisions "which are equitable, compatible with the interests of creditors and stockholders, and consistent with public policy" with respect to the manner of selection of directors, officers and the like. § 216(11). And the plan must likewise provide for the retention and enforcement of claims, not settled or adjusted in the plan, which the corporation may have against officers, directors, and others. § 216(13). But nowhere is there any indication that Congress bestowed on the bankruptcy court jurisdiction to determine that those who in fact do not have the authority to speak for the corporation as a matter of local law are entitled to be given such authority and therefore should be empowered to file a petition on behalf of the corporation. Respondents may have a meritorious case for relief. On that we intimate no opinion. But if they are to be allowed to put their corporation into bankruptcy, they must present credentials to the bankruptcy court showing their authority.

The jurisdiction which Congress has given the bankruptcy court over the debtor and its property prior to the approval of the petition (see sec. 111, sec. 112, and sec. 113) do not extend to this situation.

[2] See Rule 23(b), Rules of Civil Procedure.

[3] As defined in § 158.

It is argued that circuity of action will be avoided and the adequacy of stockholders' remedies will be enhanced if the bankruptcy court is authorized to entertain petitions like the present one. That may well be true. But any such enlargement of the jurisdiction of the bankruptcy courts is for Congress. It has chosen to withhold from stockholders the right to institute these bankruptcy proceedings. In absence of federal incorporation, intracorporate disputes of the character presented here are, as we have said, governed by state law. The creation of a new basis of federal jurisdiction to hear them, pass on their merits, and adjudicate them is a legislative act.

Reversed.

"A different question is presented where stockholders appear in opposition to a petition filed by the corporation. See sec. 206. Cf. In re Beaver Cotton Mills, 275 Fed. 498; Whittaker *v.* Brictson Mfg. Co., 43 F. 2d 485."